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No. 97-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

D.L. BAKER, INC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and LOCAL UNION NO. 26, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an employer's right to repudiate pre-hire agreements in the construction industry under Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), cannot be established through 16 years of overt non-compliance with the agreement, an act identified as a method of repudiation by this Court in *Jim McNeff v. Todd*, 461 U.S. 260, 270 n.11 (1983), because effective repudiation also requires the employer to show union notice.

2. Whether an employer's obligations under a prehire agreement that lacks a duration clause and expressly applies and refers to a "current" master collective bargaining agreement in the construction industry, terminates once the master agreement in effect at the time of signing is superseded because 1) a new successor "master" collective bargaining agreement is signed and 2) because prehire agreements are limited to the master agreements to which they refer and do not roll-over year-to-year as new master agreements are negotiated by Section 9(a) certified unions.

LIST OF PARTIES

Petitioner D.L. Baker, Inc. is a closely-held, non-public corporation owned by Daniel Baker. D.L. Baker, Inc. has no parent companies, subsidiaries or affiliates.

The Respondents here are:

The National Labor Relations Board, an agency of the United States and the International Brotherhood of Electrical Workers, Local Union No. 26, an intervenor in the court of appeals.

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NATIONAL LABOR RELATIONS BOARD

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner D.L. Baker, Inc. ("Baker") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 105 F.3d 647, 154 L.R.R.M. (BNA) 2415 (4th Cir. 1997). The Decision of the National Labor Relations Board is reported at 317

N.L.R.B. 335 (1995). These opinions and Orders are reproduced in the appendix at pages 1a and 11a,[1] respectively.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1997. 1a. A timely filed petition for rehearing was denied on June 11, 1997. 9a. Chief Justice Rehnquist granted Petitioner an extension of time to file the Petition for Writ of Certiorari to this Court on August 27, 1997 (App. No. A-156), to and including September 30, 1997. This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 151 et seq., is involved in this case.

29 U.S.C. § 158(f) provides:

> (f) Agreements covering employees in the building and construction industry.
>
> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such

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[1] "_a" references are to the accompanying Appendix hereto. "Tr." references are to the ALJ record transcripts.

agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

STATEMENT OF THE CASE

This case presents a recurring question whether the National Labor Relations Board may deprive an employer of the ability to unilaterally repudiate a prehire agreement with a labor union affecting workers in the construction industry.

Since this Court's decision in 1983 in *Jim McNeff v. Todd*, 461 U.S. 260 (1983), where it interpreted Section 8(f) of the Labor Act to find that an employer in the construction industry would be responsible for monetary obligations to a trust fund accruing under a prehire agreement until the time of repudiation, the Board and the courts of appeal have wrestled unsuccessfully with implementing this Court's guidance. In this case, the Board found that Petitioner Baker failed to repudiate the prehire agreement (hereinafter called the "Letter of Assent") under its express limited termination provision and the Fourth Circuit found that although Baker was not bound to the terms of the Letter of Assent for purposes of exercising its statutory right to repudiate, Baker had to prove the union

knew of its sixteen years of open non-compliance with the Letter of Assent for the repudiation to be effective.

The decision below orders D.L. Baker, Inc. ("Baker") to immediately adhere to the terms of the current master collective bargaining agreement with the Washington, D.C. chapter of the National Electrical Contractors Association and to make all union members whole for the period at issue for failure to utilize the union's hiring hall.

The essence of this petition is that the Fourth Circuit ruled in a manner inconsistent with the statutory design of the Labor Act charted in *Todd v. McNeff*, 461 U.S. 260 (1983), that these agreements are voidable until such time as the union attains majority status.

D.L. Baker, Inc. is a small electrical contractor performing electrical installation work on commercial facilities in Northern Virginia. It has a history of hiring both union and non-union employees. Its President, Daniel L. Baker, had been a union electrician working in Virginia since 1961. In 1976, Mr. Baker decided to enter into business himself as a sole proprietorship with the firm name of "D.L. Baker Electrical Contractor." 27a. On July 29, 1976, Mr. Baker also formed a corporation, D.L. Baker, Inc. with his wife.

The Board presented the testimony of Mr. Wade Sheriff, the Business Manager for the Union from 1976 through 1989 (with the exception of the years 1980-1983). In October 1976, Mr. Sheriff informed Mr. Baker that he could no longer participate in Union membership as an independent contractor. The union presented Mr. Baker with a short-form Letter of Assent and Benefit Fund Agreement. Both were executed in the name of his sole proprietorship, D.L. Baker, Electrical Contractor. Wade Sheriff testified that he understood that the Letter of Assent was executed by the sole proprietorship. Tr., Oct. 3, 1994 at 130 ll. 4-8.

Mr. Sheriff also testified that by 1978, Mr. Baker had not performed any work with the union and that union contributions had

not been made for the first three months in 1978. On April 1, 1978, he testified that Mr. Baker was dropped from union membership, for failure to make contributions. Tr, October 3, 1994 at 127 ll. 5-11; G. C. Ex. No. 19 at 4 ¶ 13. Mr. Sheriff also presented as General Counsel Exhibit No. 11, the sole proprietorship's business card of "D.L. Baker Electrical Contractor" as the entity executing the Letter of Assent and benefit fund agreement. Sheriff also testified that termination letters were sent to the sole proprietorship regarding its failure to make union contributions.

The Letter of Assent was a one page/three-sentence form signed on October 29, 1976 by "D.L. Baker, Elec. Contractor" and "Local Union 26, IBEW." The text is reprinted below:

LETTER OF ASSENT-A

In signing the Letter of Assent the undersigned firm does hereby authorize the Washington, D.C. Chapter, N.E.C.-A. as its collective bargaining representative for all matters contained in or pertaining to the current approved inside labor agreement between the Washington, D.C. Chapter, National Electrical Contractors Association and Local 26, IBEW. This authorization, in compliance with the current approved labor agreement shall become effective on the 29th day of October 1976. It shall remain in effect until terminated by the undersigned employer giving written notice to the Washington, D.C. Chapter, N.E.C.A. and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the aforementioned approved labor agreement.

SUBJECT TO THE APPROVAL OF THE INTERNATIONAL PRESIDENT, IBEW

NAME OF FIRM

D. L. BAKER, ELEC. CONTRACTOR

SIGNED FOR THE EMPLOYER SIGNED FOR LOCAL UNION 26, IBEW

BY Holly C. Baker /s/ BY Wade H. Sheriff, Jr. /s/
TITLE President TITLE Business Manager

DATE October 29, 1976 DATE October 29, 1976

The Board's Complaint alleges Baker failed to follow a series of NECA agreements whose terms and conditions allegedly establish effective dates at various times since 1976. However, neither the Board nor the Union introduced into evidence a copy of the "current" agreement in effect at the time of signing (October 1976) or any intervening agreement. The only NECA agreement introduced at the Board hearing was the June 1, 1993-May 3, 1997 agreement.

Mr. Sheriff testified that there were gaps in the alleged "series" of agreements. Mr. Sheriff also testified on direct examination that it was a practice for contractors to sign more than one Letter of Assent. Tr., Oct. 3, 1994 at 112 ll. 5-7.

Neither D.L. Baker Electrical Contractor nor D.L. Baker, Inc. have been members of the NECA contractors' association.

On December 8, 1993, Mr. Charles Graham of the Union, sent to "D.L. Baker Electrical Contractor," a letter signifying that it had found the Letter of Assent signed in 1976 and asserting that the "'then current' anniversary date" of the October 1976 Letter of Assent applied to the "current contract" expiring on May 31, 1997. G.C. Exhibit 13. On January 19, 1994, Mr. Graham sent an organizing letter to "Baker Electric" that the Union was involved in organizing efforts and intended to organize "Baker Electric." G.C. Ex. No. 14.

Mr. Graham testified that he had been involved in significant union organizing activities against D.L. Baker, Inc. He testified both on direct examination and on cross-examination that he sent three union members to Baker Electric in earlier years based upon

Respondent's newspaper ads. Tr., Oct. 4, 1994, Pages 173-174; (direct examination); Pages 200-201 (cross-examination). Two of these individuals, Wayne Shifflet and John Lasley, Jr., were hired by D.L. Baker, Inc.[2]

Testimony was submitted that Baker Electric had been listed in numerous Dodge Reports, a service which reports on construction activities in the area. Tr., Oct. 4, 1994. The uncontroverted testimony was that there have been five major projects for which Baker Electric, Inc. was identified in the Dodge Reports prior to the hearing. Tr., Oct. 4, 1994 at 237.

Mr. Sheriff testified that the Dodge Reports were an important monitoring tool for the Union in identifying union and non-union contractors involved in various projects. Tr., Oct. 3, 1994 at 122-123. Mr. Graham testified extensively about the Dodge Reports as a monitoring function and that the Union's business manager was responsible for keeping track of the industry within the Union's jurisdiction by reviewing these Dodge Reports. Tr., Oct. 4, 1994 at 210-215. Mr. Baker testified that Baker Electric, Inc. had been reported to the Union on three specific instances in the past 15 years with complaints that it was a non-union contractor working on union projects. Tr., Oct. 4, 1994 at 288.

The ALJ found that Petitioner D.L. Baker, Inc. was responsible for the Letter of Assent signed in the name "D.L. Baker, Elec. Contractor" on the basis that "Daniel L. Baker has previously

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[2]John Lasley, Jr. made his application for employment with Baker, Inc. on September 20, 1991. The application for employment shows that he started work on September 25, 1991, for D.L. Baker, Inc. and was terminated on October 8, 1993. Mr. Wayne Shifflet, the other individual whom Mr. Graham testified he sent to Baker, Inc. for organizing purposes, applied for employment on October 12, 1992 and began working for Baker, Inc. on October 15, 1992 and was terminated on October 5, 1993.

committed himself," 26a.[3] Further, the ALJ agreed that "Sheriff had not been advised that 'Baker, Inc.' (D.L. Baker, Inc.) was the employer." 42a. In addition, the ALJ ruled that although the 1976 master NECA agreement was not placed in evidence by the General Counsel, Petitioner can be liable for obligations existing in the 1993-97 NECA agreement simply because "the record evidence suffices and that the documents are sufficiently identified for the compliance with any order that may be issued," 35a. Concerning the question whether "all the documents must be placed in evidence. I do not agree." 38a.

Finally, the ALJ ruled that in 1993, vis-a-vis the union's knowledge of Petitioner's operations: "I infer that if Sheriff had known that Baker had begun hiring employees, the Union would have sought to enforce the agreements then, instead of waiting until now." 42a.[4]

The Board upheld the ALJ's Decision in its entirety. The Board's remedy includes requiring Petitioner to make payments to union trust funds and to all idled persons in the union's hiring hall, although the Board acknowledges that "[n]o company name was listed on the benefit fund agreement" and neither were any particu-

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[3]The ALJ made a similar finding that Daniel Baker orally agreed to comply with the union contract: "Baker promised Sheriff in 1977 to seek referrals from the Union...on behalf of his firm," 36a, without showing the basis for any consideration for such an oral agreement or which "firm" Daniel Baker referred to. Mr. Baker was the Secretary-Treasurer of the Petitioner's corporation and was not its registered agent. G.C. Ex. No. 4. An oral union agreement to comply with the union contract in order to make payments to union trust funds is void under 28 U.S.C. §§ 186(a), (b) & (c). *See United Steelworkers v. United States Gypsum Co.*, 492 F.2d 713 (5th Cir. 1974) (purpose of § 186(a) is to protect employers from extortion and ensure honest representation of employees), *cert. denied*, 419 U.S. 998 (1974). Subsection (d) establishes a criminal violation where the written requirements of subsection (c)(4)-(c)(9) are not met.

[4]The ALJ had found that one employee, Michael Tangy was fired for discriminatory reasons in violation of § 8(a)(3). That question is not presented here.

lar trust funds named. Member Cohen dissented from ordering Petitioner to offer immediate employment to union members in the union's hiring hall since August 7, 1993, since there is no evidence in the record that the union had a mandatory hiring hall in the 1976 NECA Agreement as well. 14a n.4.

Baker petitioned the Fourth Circuit for review of the Board's order under Section 10(f) of the Act, and the Board filed a cross-application for enforcement, under sections 10(e) of the Act. 29 U.S.C. §§ 160 (e) & (f). The Fourth Circuit enforced the Board's order. *D.L. Baker, Inc. v. NLRB*, 105 F.3d 647, 154 L.R.R.M. (BNA) 2415 (4th Cir. 1997). 1a.

The result of the Fourth Circuit's accommodation is that many employers in the construction industry that may have signed prehire agreements in the past for work to be performed on particular construction sites and applying specific "current" labor agreements to those sites and upon which a job bid might have been based and for which employers may have gone in and out of business over the course of many years, are finding themselves bound to all succeeding master agreements The appellate court concluded that this Court's decision in *Todd v. McNeff* requires "at least that the Union have some form of notice of the inconsistent conduct," 6a, before an employer can terminate its liability.

The crucial legal issue is the new judicial requirement adding to the Court's ruling in *Todd v. McNeff*, that "appropriate action" to exercise "the right to repudiate the contract" requires the union is notified. What forms of repudiation were effective was left open by the Court in *McNeff* and has caused a conflict in the circuits.

Petitioner asks that the Court affirm the observation made in footnote 11 in *Todd v. McNeff* that repudiation by "engaging in activity overtly and completely inconsistent with contractual obligations" is a valid method of repudiation independent of efforts to send notice to the union or assuring that the union is actually apprised of the employer's specific acts of repudiation. Upon such a relook, the factual record in this case will demonstrate that the

Board acted improperly in determining Baker had committed an unfair labor practice under the Act.

REASONS FOR GRANTING THE WRIT

I.

A CIRCUIT CONFLICT EXISTS IN REQUIRING UNION NOTIFICATION IN ADDITION TO OPEN AND NOTORIOUS EMPLOYER CONDUCT ADVERSE TO THE EXISTENCE OF A PREHIRE AGREEMENT FOR EFFECTIVE REPUDIATION OF A PREHIRE AGREEMENT TO OCCUR.

In the years since this Court's ruling in *Jim McNeff v. Todd*, 461 U.S. 260, which resolved a conflict in the circuits on the enforceability of monetary obligations under a prehire agreement through an independent Section 301 suit, 29 U.S.C. § 185, the circuit courts have diverged in recognizing what actions are required to effect a repudiation. The Court in *McNeff* had concluded that such obligations accruing prior to repudiation were recoverable.

In resolving that issue, the Court reviewed Section 8(f) of the Labor Act and the "fidelity" to the legislative purpose for which it had been designed by Congress. 461 U.S. at 269. That is, because of the unique conditions of sporadic employment of workers in the construction industry, the seasonal nature of construction work, and the need for contractors to be able to submit bids based on reliable local labor costs, limited contracts were permissible between unions and employers regarding labor costs, regardless of the union's majority status. 461 U.S. at 265-66.

In reaching the central issue in *McNeff*, the Court found that the legislative purpose was promoted by the voidability of such agreements until the union obtains majority status in the bargaining unit. *Id.* at 269. Until that time, either party retains "its undoubted right to repudiate a prehire agreement." *Id.* at 270.

In that case, however, this Court declined to decide "[w]hatever may be required of a party wishing to exercise its undoubted right to repudiate." *Id.* Rather, the Court expressly reserved judgment on "what specific acts would affect the repudiation of a prehire agreement—sending notice to the union, engaging in activity overtly and completely inconsistent with contractual obligations, or, as respondents suggest, precipitating a representation election pursuant to the final proviso in § 8(f) that shows the union does not enjoy majority support." *Id.* at 270 n.11.

The Fourth Circuit interpreted the Court's ruling to mean that "acts sufficient to repudiate the prehire agreement *require* at least that the Union have some form of notice of the inconsistent conduct," 6a (emphasis added), although that was not suggested or mentioned by the Court in *McNeff*. The Fourth Circuit concluded that the sixteen years of noncompliance by Baker was insufficient for repudiation to be effective. Moreover, the Fourth Circuit put the burden on Baker to establish what facts would make the union aware of the noncompliance, without explaining what policy is promoted by affirmative action to notify the union, inasmuch as the union cannot prevent repudiation. 6a.

This added requirement has never been suggested by the Court in its opinions, especially *NLRB v. Local Union No. 103, Iron Workers (Higdon Contr. Co.), 434 U.S. 335, 345 (1978)*, where the Court held that "[t]he employer's duty to bargain and honor the contract is contingent on the union's attaining majority support." The employer could repudiate at any point up to the time of union majority representation. But, the Fourth Circuit's addition of a notification requirement reinforces a conflict that has grown in the circuits. Specifically, the Ninth Circuit in *Carpenters Southern California Admin. Corp. v. J.L.M. Constr. Co.*, 809 F.2d 594 (9th Cir. 1987), *reh'g granted*, 840 F.2d 723 (9th Cir. 1988), *vacated as moot*, 872 F.2d 930 (9th Cir. 1989), explained the methodology for an employer's repudiation by "conduct" alone. There the employer for a period of five years did not make any payments to trust funds in compliance with the prehire agreement, never represented it had a union contract, never won a contract as a result of union affiliation, never used the union's hiring hall to obtain

workers, never enjoyed any benefits under the contract, never performed any obligations under the agreement, or sought to enforce any union obligations. 809 F.2d at 599. This conduct was found to be an effective form of repudiation under *McNeff*. *Also International Bhd. of Electr. Workers v. KBR Electric*, 812 F.2d 495 (9th Cir. 1987).

Like the Fourth Circuit below, the trust funds in *J.L.M. Constr. Co.* asserted the same argument that "there is no evidence that the Union knew of the conduct," but did not prevail. The Ninth Circuit found that that argument "confuses repudiation by conduct with repudiation by actual notice." *Id.*[5]

Baker's actions have been similarly open and consistent as J.L.M.'s in not conforming with the operation of the Letter of Assent to which it has always insisted it was never bound. By the same token, the union's actions have been similarly instructive, for over a decade it never conducted itself to comply with its terms of the agreement. Unlike McNeff, Inc., but like J.L.M. Construction Co., Baker received no benefits from the prehire agreement enforced by the court below. While in *McNeff*, the Court noted that, in fairness, when "[h]aving had the music," the employer "must pay the piper, "[b]y the same token, the union cannot simply accept the employer's performance under a prehire contract without upholding its end of the bargain." *McNeff*, 461 U.S. at 271. *Cf. Carpenters Amended & Restated Health Benefit Fund v. Holleman Constr. Co.*, 751 F.2d 763, 770-71 (5th Cir. 1985) (payments on behalf of certain workers did not manifest a course of conduct or intent to be bound by a prehire agreement since employer accepted no benefits).

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[5]In a case decided eleven days before the Fourth Circuit denied rehearing in the case at bar, the Fourth Circuit did uphold an employer's right to repudiate an NECA/Electrical Workers Letter of Assent identical to the one signed by Petitioner Baker here, where the employer wrote the union a letter terminating bargaining authority to NECA and repudiating the current agreement. *Industrial Turnaround Corp. v. NLRB* 115 F.3d 248 (4th Cir. 1997).

The conflict in the circuits is further joined by those courts recognizing that long periods of non-compliance is sufficient to effect a repudiation and by other circuit courts that require the union to have had some notice. In the latter camp are the First Circuit in *C.E.K Ind. Mechanical Contractors, Inc.* NLRB, 921 F.2d 350, 358 (1st Cir. 1990); the Seventh Circuit in *Gould v. Lambert Excavating, Inc.*, 870 F.2d 1214, 1219 (7th Cir. 1989) (prehire agreement may be repudiated by "inform[ing the Union] in some manner that the employer no longer intended to be bound by the agreement," *quoting Iron Workers Local 103 v. Higdon Constr.*, 739 F.2d 280 (7th Cir. 1984));[6] and the Eleventh Circuit in *Local Union 48 Sheet Metal Workers v. S.L. Pappas & Co.*, 106 F.3d 970, 975 (11th Cir. 1997) ("must give notice").

The Circuits supporting the position that repudiation is effective by non-complying conduct include the Fifth Circuit in *Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1472 (5th Cir. 1993); the Eighth Circuit in *NLRB v. Drywall*, 974 F.2d 1000, 1004 (8th Cir. 1992) (failure to make fund contributions month after month is repudiation);[7] and the Tenth Circuit in *Wyoming Laborers Health & Welfare Plan v. Morgen &*

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[6]The Seventh Circuit has since decided that unilateral repudiation is no longer permissible in its Circuit and that parties must file an election petition with the Labor Board under *John Deklewa & Sons, Inc.*, 282 N.L.R.B. No. 184 (1987), *enf'd sub nom.*, 843 F.2d 770 (3d Cir. 1987), *cert. denied*, 488 U.S. 889 (1988) *NLRB v. Bufco Corp.*, 899 F.2d 608 (7th Cir. 1990).

[7]The Eighth Circuit in *Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Harkins Constr. & Equip. Co., Inc.*, 733 F.2d 1321, 1327 (8th Cir. 1984), had stated that the "mere breach of contract will ordinarily not suffice to establish repudiation," and other circuit courts have followed that opinion's lead. In *Contractors, Laborers, Teamsters & Engineers v. Hroch*, 757 F.2d 184, 189 (8th Cir. 1985), the court held that repudiation in a case of conduct inconsistent with contractual obligations would occur by operation of law whenever the union sought legal enforcement or began to picket the employer.

Osgood Constr. Co., Inc., 850 F.2d 613, 623 (10th Cir. 1988) (conduct alone sufficient).[8]

This view causes two sets of problems recognized in the caselaw. The first is for employers who contest the existence of a prehire agreement, and the second is for those who seek to unilaterally void a prehire agreement.

For the former, those employers not aware they are bound, would not be expected to convey notice or publicize overtly adverse actions to a union or any other supplier of services, because there would be no point in doing so. For the latter, the opinion fails to account for the purpose of any union behavior in response to the employer's efforts to repudiate by focussing on the form of the employer's repudiation, rather than the employer's intent not to be bound any further. In fact, Section 8(f) only allows the voluntary making of an agreement not any good faith bargaining between the parties. *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693 (1971). Hence, no legal purpose under the statute is served by employer proof that the union had notice.

Since, there is no basis to argue that Baker has reaped benefits from the prehire agreement and is now seeking to "avoid paying the bargained-for consideration," *McNeff*, at 271, the court of appeals erred in finding that Baker must comply with its terms. That same error and its resulting windfall to labor unions and inordinate loss of capital (and frequently closure of the entire business) to the employer, and the likely displacement/termination of current employees after long years of service, is not supported by the legislative history or this Court's precedents in *McNeff* and *Higdon Contr. Co.* Specifically, the decision below does nothing to further the Section 7 rights of the current workforce. "It is true that 'by its plain terms, . . . the NLRA confers rights only on employees, not

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[8]In *NLRB v. Viola Ind.-Elevator Div., Inc.*, 979 F.2d 1384 (10th Cir. 1992), the circuit court held that it would abide by the Board's *Deklewa* rule and apply its holding retroactively.

on unions or their nonemployee organizers.'" *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992).

Finally, the type of prehire agreement at issue here, i.e., one that does not on its face state its duration or that it would in fact repeatedly roll-over for 3 year periods unless its express termination provision is exercised, provides a union with a contract guarantee of performance just like a certified bargaining agent would have under Section 9(a) of the Act, 29 U.S.C. § 159(a). The Board has taken the position that roll-over provisions in prehire agreements are enforceable by minority unions just as they are by majority unions. *Wilson & Sons Heating & Plumbing Co.*, 302 N.L.R.B. 802 (1991)[9], *enf't denied* 971 F.2d 758 (D.C. Cir. 1992); *Fortney & Weygandt*, 298 N.L.R.B. 863 (1990). The Sixth Circuit recently refused to enforce a Board order against a prehire contractor where the parties to the master 9(a) agreement had terminated the master agreement and where the prehire agreement had a stated duration period. *Automatic Sprinkler Corp. v. NLRB*, 120 F.2d 612 n.4 (6th Cir. 1997). In the case at bar, the underlying master contract had also expired and the prehire agreement contained no period of duration, but the Fourth Circuit interpreted the word "current" to have a futuristic meaning and hence, was a "renewal clause." 7a. Judicial caselaw is clearly not uniform in the application of these renewal provisions.

Employers do know that union agreements are protected for only three years from decertification and that union contracts routinely last that long. Hence, when a prehire contractor signs up, three years is what it might expect to comply with. This belief is what the Board told this Court in its brief opposing certiorari in *Deklewa v. NLRB*, No. 88-70 (1988), at 12: "By enacting Section

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[9]Chairman Stephens dissented, 302 N.L.R.B. at 807, on the grounds that the since parties to the master agreement had themselves terminated the "current" agreement by signing a new one and because the letter of assent in effect had itself no claimed period of duration, the prehire contractor's obligation had ceased. These reasons the D.C. Circuit agreed with in denying enforcement. The Fourth Circuit was apprised of this case but failed to adhere to that conclusion, creating an additional conflict in Section 8(f) caselaw.

8(f), Congress sanctioned the negotiation of prehire agreements that would settle employment conditions in particular areas for periods of up to three years." This is the period that Petitioner suggests a prehire agreement may be enforced subject to repudiation, without interfering with the voluntary organizational rights of employees under Section 7 of the Act.

The decision below fails to account for these distinctions and the statutory right to repudiate at any time. That result further exacerbates a grave imbalance in the limited exception to majority worker rights permitted by contract's subject to Section 8(f).

II.

THE STATUTORY METHOD OF UNILATERAL REPUDIATION OF PREHIRE AGREEMENTS IS UNDERMINED IF THE COURTS TREAT THEM AS ARMS LENGTH AGREEMENTS AND NOT SUBJECT TO CONTRACT FORMATION DEFENSES OF ILLEGAL "PRESSURE," DURESS OR INVOLUNTARY CONSENT.

The Fourth Circuit's mistake is the abdication of the responsibility to ensure the voluntariness of prehire agreements.[10] The Board's present view restricts the agency to only refereeing elections and breaks from the Court's "concerns with the § 7 rights of employees to select their own bargaining representative and [ ] fidelity to Congress' intent that prehire agreements be voluntary - and voidable... ." *Jim McNeff, Inc. v Todd*, 461 U.S. 260, 269 (1983). Only by permitting unilateral repudiation at any time is the statutory right to enter into minority union contracts protected.

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[10]The Board's current position is not in disagreement, but the Board interprets the legislative command to be a one way street. There is permission to enter into agreement, but no statutory right to ever back out, except by express contractual terms. *Deklewa*, 124 L.R.R.M. at 1191.

In *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 n.17 (1982), the Court specifically noted that it has not resolved the question whether a union has a right to use economic pressure such as picketing to compel an employer to enter into a prehire agreement in the first instance. The legislative history to § 8(f) stresses that prehire agreements must be voluntary. In remarks made on the floor of the Senate, Senator John F. Kennedy stated:

> It was not the intention of the committee to require by [§8(f)] the making of prehire agreements, but rather, *to permit* them, nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements.

104 Cong. Rec. 11308 (July 16, 1958), 2 Leg. Hist. of the LMRDA at 1715.

In *McNeff*, 461 U.S. at 270 n.9, the Court also determined that when a labor union merely informs a subcontractor that his contract with the general contractor calls for the use of union labor on the jobsite and the general contractor informs him "that he was required to sign the agreement to remain on the project," there is no coercion or unlawful "pressure" within the meaning of § 8(f) of the LMRA, 29 U.S.C. § 158(f), to invalidate the prehire agreement later reached. *Id.* at 1755. In *McNeff*, the Court found it "clear in this case that petitioner entered into the prehire agreement voluntarily." *Id.* at 1758. Consequently, distinctions between the situation in *McNeff* where a union conveys union job requirements to a subcontractor who is already bound to apply union scale and a situation where a union pickets to obtain a prehire agreement from a "stranger" contractor and threatens to interfere with the business, must be acknowledged. *Connell Const. Co. Inc. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616 (1975). In the latter case, the union uses its coercive economic power to violate the carefully crafted provision "that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the

narrow exception being established to the majority principle. *NLRB v. Local No. 103, BSOIW*, 434 U.S. 335, 347 n.10 (1978).[11]

Merely because prehire agreements are authorized in the construction industry, does not eliminate the fact and the defense that they are routinely coerced. By its decision below, the Board also removed the ability of nonunion contractors to prove duress and lack of mutual assent in enforcement cases, *viz.*, lack of voluntariness, in the formation of a prehire agreements to be based on both union statements limiting the scope of the agreement and such obvious deeds as picketing or noncompliance through laches. This is because the Board's election process elevates the prehire agreement to a protected contract and applies its decision retroactively to all situations prior to 1987 when *Deklewa* was issued. However, this fails to accommodate contract formation defenses or employer self-help by repudiation.

In *NLRB v. Local Union No. 103, Iron Workers (Higdon Contr. Co.)*, 434 U.S. 335 (1978), the Court held that it is an unfair labor practice for a union to engage in picketing to *enforce* a prehire agreement where it has not obtained majority status. *Id.* at 346. This result obtained because to hold otherwise would grant the union rights which are reserved by Congress only for majority representatives. This would cause "top-down organizing," a particular objective that Congress in the Landrum-Griffin Act had attempted to limit. *Id.* at 346-47, *citing Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 632 (1975).[12]

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[11]In *Connell*, the permissibility of union direct action to obtain subcontracting agreements was found only if "included in a lawful collective bargaining agreement.... In this case, Local 100 had no interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can provide no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firm's from the subcontracting market." (citations omitted).

[12]Prior to the decision at bar (and *Deklewa*), it had been well established that a prehire agreement for a jobsite by jobsite employer such as Petitioner does not

(continued...)

The Board has side-stepped these important legislative concerns and given support to picketing and union threats to *obtain* prehire agreements, *Laborers Local 1184 (NVE Constructors)*, 296 N.L.R.B. No. 165 (1989), *enf'd*, 934 F.2d 1084 (9th Cir. 1991), and to permit unions to picket to compel renewal of expired 8(f) agreements or bargaining for a successor 8(f) agreement. *Laborers Local 98 (Fisher Construction)*, 296 N.L.R.B. No. 166 (1989).[13]

This expansion of Section 8(f) loses sight of the Congressional objective that § 8(f) is to be a limited exception to the majority principle of contracting. Under this holding, the Board exalts the form of the contract over the substance of what has been rendered to the workforce. It is obviously inconsistent for a union now to be protected for up to 30 days to picket to obtain or continue a prehire agreement, unable to enforce a prehire agreement during its duration through picketing, but able to *enforce* the terms of a prehire agreement by legal action until an election petition is filed with the Board. *McNeff* and *Higdon* simply do not support this result.

Petitioner also suggests that the decision below cannot be considered in a vacuum. Many of these cases involve small employers misled or tricked into signing agreements that later turn out to be entirely different than bargained for despite the *McNeff*

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[12](...continued)
endure indefinitely. The union must establish a new majority at each site to enforce a prehire agreement. *Contractors, Laborers, Teamsters & Engineers Pension Plan v. F & H Construction Co.*, 789 F.2d 430 (8th Cir. 1986); *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 366 (5th Cir. 1981) (en banc).

[13]This Court was told by the Board in 1988 in its Opposition Brief to Certiorari in *Deklewa v. NLRB*, 848 F.2d 770 (3d Cir. 1987), *cert. denied*, No. 88-70 at 16 (Sept 1988), 488 U.S. 889 (1988), that "[t]he Board's current policy meets that congressional concern [of voluntariness underscored in *Higdon*]: the voluntary commitment must be honored, but that commitment will not require involuntary recognition of the union nor bargaining with that union *to secure a future agreement*." (emphasis added). The Board has since made it plain that the voluntary acceptance of an initial prehire agreement causes the parties contract to be treated in all but very limited respects, as an agreement protected by Section 9(a) of the Act.

ruling. In *Operating Engineers Pension Trust v. Giorgi*, 788 F.2d 620 (9th Cir. 1986), Judge Kozinski in a concurring opinion, notes that small employers have little bargaining power and that the Ninth Circuit is well aware from numerous cases coming before it that business agents (for the very union before it) have repeatedly misled these employers with separate deals and oral arguments, but that the court must enforce the agreements on written terms not specifically bargained for.

Labor agreements were fundamentally designed by Congress to preserve the full freedom of contract for the parties. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). In *Caporale, et al. v. Mar Les, Inc.*, 656 F.2d 242 (7th Cir. 1981), Mar Les signed memoranda with the union intending for it to apply to only one employee. However, the forms turned out to recognize the union for all employees and incorporated a collective bargaining agreement and trust agreement. The Seventh Circuit refused to enforce the agreements involved in the case on the grounds that, "[w]hile the agreement may have created some limited contractual relationship between the parties, it did not bind the defendant to a collective bargaining agreement that was never conveyed to the defendant. There was never mutual assent to the terms sought by the plaintiffs." *Id.* at 245.

The Seventh Circuit has now gone the other way and prohibits the presentation of contract formation defenses in suits to enforce prehire agreements. *Central States Southeast & Southwest Areas Pension Fund v. Gerber Trucking Svc., Inc.*, 870 F.2d 148 (7th Cir. 1987). In *Gerber*, Gerber was a non-union company that purchased a union firm. To accommodate three union workers close to retirement, he signed a full agreement with the business agent, both intending their agreement to cover the three workers only. The Seventh Circuit held that the trust fund was not bound to any limiting agreement made by the privies and held Gerber liable for contributions for its entire workforce. 879 F.2d at 1153. The court "recognize[d] that the upshot may be harsh. Had Gerber known that Gonzales could not keep his pledge to withhold enforcement, he would not have signed; the cost of covering the [three workers]

would have been too steep. Section 515 does not admit of such an equitable defense." 870 F.2d at 1155.[14]

In *Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984), the Ninth Circuit refused to enforce a pension contribution provision where the alleged employer sought to sign up as an owner-operator but was given a prehire agreement to sign rather than the owner-operator form. "Thus, the surrounding circumstances and the intentions of the parties are relevant to determining if a binding agreement exists." *Id.* at 1504. The agreement was not enforced.

It is a matter of ease for the Court to take judicial notice that prehire agreements are often obtained under conditions other than arms length. *See United States v. Pecora*, 267 F.2d 512, 515 (3d Cir. 1959) (involving 29 U.S.C. § 186). The question of voluntariness must, therefore, always be considered when reviewing such an agreement. *See Gasaway*, *supra*. The Board's current enforcement mechanism and the Fourth Circuit's notice requirement fail to account for this process at all. But it is representative of a recurring problem with not abiding by the very simple legislative purpose that prehire agreements are voidable at any time because of their very apparent conflict with employee associational rights and implementation by coercion.

Hence, there is a great need for this Court to declare that Section 8(f) of the Labor Act permits either party to a prehire agreement to terminate it without notice at any time.

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[14]In a similar manner, the Seventh Circuit would not permit an employer to terminate a prehire agreement. In *Martin v. Garman Constr. Co.*, 945 F.2d 1000 (7th Cir. 1991), *cert. denied*, 502 U.S. 1122 (1992), the employer had a one-man unit. It filed an election petition with the Board and sent the union and trust fund notices of repudiation, but was held still bound by the agreement vis-a-vis the trust fund. *Also Gasaway v. Laborers' Pension Fund*, 124 L.R.R.M. (BNA) 2269 (N.D. Ill. 1985), 793 F.2d 1296, 124 L.R.R.M. (BNA) 2360 (7th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) (college student pressured into signing prehire agreement by several union business agents on his first commercial job could not repudiate).

CONCLUSION

For these reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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Dated: September 30, 1997

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local Union No. 26,
Intervenor,

v.

D. L. BAKER, t/a Baker Electric,
Respondent.

No. 96-1377

D. L. BAKER, t/a Baker Electric,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local Union No. 26,
Intervenor.

No. 96-1548

On Petition for Review and Cross Application
for Enforcement of an Order of the
National Labor Relations Board.
(5-CA-24131, 5-CA-24190)

Argued: December 6, 1996
Decided: January 8, 1997

Before WILKINS, HAMILTON, and WILLIAMS, Circuit Judges.

Application for enforcement granted and petition for review denied by unpublished per curiam opinion.

COUNSEL

ARGUED: J. Raymond Sparrow, Jr., SHUMATE, KRAFTSON & SPARROW, P.C., Reston, Virginia, for Baker. Julie Brock Broido, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for NLRB. Brian A. Powers, O'DONOGHUE & O'DONOGHUE, Washington, D.C., for Intervenor. ON BRIEF: Michael E. Avakian, THE CENTER ON NATIONAL LABOR POLICY, INC., North Springfield, Virginia, for Baker. Frederick L. Feinstein, General Counsel, Linda Sher, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Margaret Gaines Neigus, Supervisory Attorney, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for NLRB. John M. McIntire, O'DONOGHUE & O'DONOGHUE, Washington, D.C., for Intervenor.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The National Labor Relations Board (the Board) filed a complaint against D. L. Baker, Inc. (the Company) on February 7, 1994, alleging that the Company violated § 8(a)(1) and (a)(3) of the National Labor Relations Act (the Act), *see* 29 U.S.C.A. § 158(a)(1), (a)(3) (West 1973), by firing an employee for pro-union activity, and that the Company violated § 8(a)(1) of the Act by coercively interrogating employees about union activity, *see* 29 U.S.C.A. § 158(a)(1). Later, the Board filed a second complaint, alleging that the Company violated § 8(a)(1) and (a)(5) of the Act, *see* 29 U.S.C.A. § 158(a)(1), (a)(5) (West 1973), by refusing to comply with a § 8(f) prehire agreement, see 29 U.S.C.A. § 158(f) (West 1973). On May 19, 1994, the complaints

were consolidated. The case was heard by an administrative law judge (ALJ) on October 3 and 4, 1994.

The ALJ concluded that the Company had violated the Act by (1) firing Michael Tangy for his pro-union activity; (2) coercively questioning other employees about their union activities; and (3) refusing to adhere to the current collective bargaining agreement between Local Union No. 26, International Brotherhood of Electrical Workers (the Union), and the Washington, D.C., Chapter of the National Electrical Contractors Association (NECA). After considering exceptions filed by the Company, the Board adopted the ALJ's factual findings, legal conclusions, and proposed order.[1] Thereafter, the Company filed a petition for review, and the Board filed a cross-petition for enforcement of the order.

The ALJ's findings of fact are adequate to address most of the Company's arguments. Therefore, we will reiterate the facts only when specifically relevant. And although we review de novo the ALJ's legal conclusions, if accepted by the Board, "we must sustain the [ALJ's] factual findings 'if supported by substantial evidence on the record considered as a whole.'" *Virginia Concrete Co. v. NLRB*, 75 F.3d 974, 980 (4th Cir. 1996) (quoting 29 U.S.C.A. § 160(e) (West 1973)). Moreover, "absent exceptional circumstances, the ALJ's credibility findings, when adopted by the Board are to be accepted by the [reviewing] court'" *NLRB v. Air Prods. & Chems., Inc.*, 717 F.2d 141, 145 (4th Cir. 1983) (alteration in original) (quoting *Dubin-Haskell Lining Corp. v. NLRB*, 375 F.2d 568, 571 (4th Cir. 1967)).

In its petition, the Company argues first that there was insufficient evidence to support the Board's conclusion that Michael Tangy was fired for pro-union activity. The Company lodges a similar evidentiary argument against the Board's conclusion that other employees were coercively interrogated about their union activities. Finally, the Company challenges the holding that it violated § 8(a)(1)

[1]The Board did modify the ALJ's proposed remedy for the Company's violation of § 8(a)(1) and (a)(5). That issue is not before us, however, and we need not address it.

and (a)(5) by not adhering to the current § 8(f) agreement between the Union and NECA. Finding no merit to the Company's arguments, which we consider in turn, we deny the Company's petition for review and enforce the Board's order.

I.

An employer violates § 8(a)(1) and (a)(3) of the Act by firing an employee because of the employee's pro-union activities. *See FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995); *NLRB v. Hale Container Line, Inc.*, 943 F.2d 394, 398 (4th Cir. 1991). Here, the ALJ concluded, and the Board agreed, that "[b]y discriminatorily discharging Michael Tangy on December 1, 1993, for supporting the Union, the Company has engaged in unfair labor practices" under § 8(a)(1) and (a)(3). (J.A. at 621.)

Applying our deferential standard of review, we uphold the ALJ's findings of fact, which are clearly supported by substantial evidence in the record. The ALJ specifically found that Tangy's testimony was "truthful" (J.A. at 612), and that Tangy's witness, Graham, "impressed [the ALJ] favorably as being [a] truthful witness[], trying to recall accurately what had happened" (J.A. at 612). On the other hand, the ALJ found that Daniel Baker, one of the principal witnesses for the Company, "clearly gave fabricated testimony" (J.A. at 612), and that "the Company fabricated the defense that it had already decided to discharge Tangy" because of his poor performance (J.A. at 613). In short, the ALJ observed the witnesses at length and made specific credibility determinations, and the Board "carefully examined the record and [found] no basis for reversing the [ALJ's] findings." (J.A. at 609 n.1.) Because we must accord substantial deference to the ALJ's credibility determinations and factual findings, as adopted by the Board, we accept the conclusion that the Company fired Tangy because of his pro-union activities and therefore violated § 8(a)(1) and (a)(3).

II.

An employer also violates § 8(a)(1) by coercively interrogating employees about their pro-union activities. *See Equitable Gas Co. v. NLRB*, 966 F.2d 861, 866-67 (4th Cir. 1992); *NLRB v. Nueva Eng., Inc.*, 761 F.2d 961, 966 (4th Cir. 1985). Mindful of our deferential standard of review, we note that "[t]he coercive effect of an employer's speech in a particular labor relations setting, 'is a question essentially for the specialized experience of the NLRB,'" J. *P. Stevens & Co. v. NLRB*, 638 F.2d 676, 687 (4th Cir. 1. 980) (quoting *Daniel Constr. Co. v. NLRB*, 341 F.2d 805, 811 (4th Cir. 1965)). The ALJ found that the Company "coercively interrogated employees and inform[ed] employees that it discharged Tangy because of his union-related activity...." (J.A. at 621.) The Company does not deny that it questioned employees about their union activity, but argues only that the questioning was not coercive. The Company's lengthy argument, however, does not change the fact that the ALJ heard the witnesses, weighed the evidence, made credibility determinations, and concluded that these statements were coercive. As noted above, the ALJ's factual determination is entitled to deference on appeal. We therefore find substantial evidence in the record to support the ALJ's conclusion, adopted by the Board, that the Company coercively interrogated its employees about their union activity, thereby violating § 8(a)(1) of the Act.

III.

Finally, the Company challenges the Board's holding that it violated § 8(a)(1) and (a)(5) by failing to adhere to the current § 8(f) agreement between NECA and the Union. Section 8(f) allows employers or multiemployer associations in the construction industry to enter into collective bargaining agreements, commonly called "prehire agreements," with unions that have not formally established majority status. *See* 29 U.S.C.A. § 158(f). Moreover, an individual construction employer can voluntarily enter a "me-too" agreement, in which the individual employer authorizes a multiemployer bargaining association to represent it in § 8(f) negotiations. In such an arrangement, the individual employer agrees to be bound to the § 8(f) agreement reached

between the multiemployer bargaining association and the union. Here, the ALJ concluded, and the Board agreed, that the Company had violated the current § 8(f) agreement between NECA and the Union, to which it was bound by virtue of two "me-too" documents the Company signed in 1976.[2] Although the Company challenges this conclusion on several grounds, we reject each of the Company's arguments.

The Company first argues that it repudiated the 1976 "me-too" documents by sixteen years of "notorious" nonunion operations. We disagree.[3] In *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 270 n.11 (1983), the Supreme Court recognized that certain "specific acts would affect the repudiation of a prehire agreement." *See also Clark v. Ryan*, 818 F.2d 1102, 1107 (4th Cir. 1987) (recognizing that, until an § 8(f) agreement is repudiated, it must be followed). Under *McNeff* and Clark, however, acts sufficient to repudiate the prehire agreement require at least that the Union have some form of notice of the inconsistent conduct. Here, the ALJ specifically found that the Company "succeeded in operating nonunion without discovery by the Union until September 1993" (J.A. at 621), and that "[t]here was no reason for [the Union] to suspect that Baker was reneging on his promises and operating nonunion" (J.A. at 620). These factual findings are supported by substantial evidence and are not contradicted by any evidence offered by the Company. Therefore, we must reject the Company's argument that its conduct prior to September 1993 was sufficiently "notorious" to repudiate the contract.

The Company also argues that it is not bound to the current § 8(f) agreement between NECA and the Union because, in 1976, it agreed only to be bound to the "current approved labor agreement."

[2]The two "me-too" documents were the "Letter of Assent-A" (J.A. at 402) and the "Benefit Fund Agreement" (J.A. at 403).

[3]The ALJ apparently assumed that *John Deklewa & Sons, Inc.*, 282 N.L.R.B. Dec. 1375 (1987), *enforced sub nom. International Ass'n of Bridge, Structural & Ornamental Iron Workers v. NLRB*, 843 F.2d 770 (3d Cir. 1988), controlled the issue. (J.A. at 616, 621.) Because the Fourth Circuit has not adopted *Deklewa*, we analyze the Company's argument under *Clark v. Ryan*, 818 F.2d 1102 (4th Cir. 1987). The result, however, does not change under the rationale of either decision.

Because the § 8(f) agreement existing in 1976 has been replaced by a series of four successor agreements, culminating in the current § 8(f) agreement, the Company argues that its consent in the "me-too" documents it signed in 1976 does not bind it to the current § 8(f) agreement.

The ALJ found, however, that the Company was bound to the current § 8(f) agreement by virtue of renewal clauses contained in both "me-too" documents,[4] as well as in each § 8(f) agreement. Although we normally afford the ALJ and the Board considerable deference, we owe no deference to the interpretation of contractual provisions, which we review de novo. *See Litton Fin. Printing Div.* v. NLRB, 501 U.S. 190, 203 (199 1) ("We would risk the development of conflicting principles were we to defer to the Board in its interpretation of the contract. . . ."). We agree, however, with the Board's conclusion that the Company is bound to the current § 8(f) agreement. Other courts have reached the same result. *See Local 257, Int'l Bhd. of Elec. Workers v. Grimm*, 786 F.2d 342, 345-46 (8th Cir. 1986) (binding an employer to successor § 8(f) agreements by virtue of "me-too" documents identical to those in the instant case); *NLRB v. Black*, 709 F.2d 939, 940-41 (5th Cir. 1983) (per curiam) (holding that a "me-too" document signed in 1978 bound the employer to a § 8(f) agreement effective from 1979-81); *Nelson Elec. v. NLRB*, 638 F.2d 965,967-68 (6th Cir. 1981) (per curiam) (finding that an employer was bound to a "new collective bargaining agreement" that became effective after the employer signed a "me-too" document identical to the one at issue here). We therefore agree with the ALJ and the Board that the Company's delegation of bargaining authority to NECA continued until revoked, and that prior to this action the Company did not revoke NECA's authority.

[4]Specifically, the Letter of Assent-A authorized NECA to act as the Company's "collective bargaining representative for all matters contained in or pertaining to the" § 8(f) agreement between NECA and the Union. (J.A. at 402.) This authorization was to "remain in effect until terminated by [the Company] giving written notice...." (J. A. at 402.) The Benefit Fund Agreement contained similar language. (J.A. at 403.)

Accordingly, we accept the Board's conclusion that the Company was bound to the current § 8(f) agreement between NECA and the Union.[5]

IV.

In conclusion, we agree with the Board's holding that the Company violated § 8(a)(1) and (a)(3) by firing Tangy for his pro-union activities, and that the Company violated § 8(a)(1) by coercively interrogating employees. Moreover, we accept the Board's holding that the Company violated § 8(a)(1) and (a)(5) by refusing to adhere to the current § 8(f) agreement between the Union and NECA. Because the Company never effectively repudiated the § 8(f) agreement, it may be held liable for breaching its terms. We therefore deny the Company's petition for review and grant the Board's cross-petition for enforcement.

PETITION FOR ENFORCEMENT GRANTED;
PETITION FOR REVIEW DENIED

[5]The Company also argues that because Holly Baker, Baker's ex-wife, signed the 1976 "me-too" documents in the name of Baker's sole proprietorship, the Company itself is not bound to the current § 8(f) agreement. Holly Baker signed the "me-too" documents, however, as "President" of the employer, and the Company never explains how she could have been the president of a sole proprietorship. Moreover, the Company has never demonstrated that Daniel Baker was, in fact, operating two separate legal entities. We therefore reject this argument on the Board's reasoning. (J.A. at 609.)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 11, 1997

No. 96-1377
5-CA-21131
5-CA-24190

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local Union No. 26,

Intervenor,

v.

D. L. BAKER, t/a Baker Electric,

Respondent.

No. 96-1548
5-CA-24190
5-CA-24131

D. L. BAKER, t/a Baker Electric,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local Union No. 26,
Intervenor.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The respondent's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

NATIONAL LABOR RELATIONS BOARD
317 N.L.R.B. 335

D. L. Baker, Inc., t/a Baker Electric and Local Union No. 26, International Brotherhood of Electrical Workers

Cases 5-CA-24131 and 5-CA-24190

May 8, 1995

DECISION AND ORDER

BY MEMBERS, BROWNING, COHEN, AND TRUESDALE

On December 21, 1994, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Charging Party filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's

rulings, findings,[1] and conclusions,[2] to modify his remedy, and to adopt the recommended Order.

The Respondent excepts to the judge's finding that it is bound by the October 29, 1976 Letter of Assent-A, arguing that the Letter of Assent-A was signed by "D. L. Baker, Elec. Contractor," rather than

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. II.B.7. par. 11, of his decision, the judge states that Sheriff testified about events in "December 1993." The correct date is "December 1976." In addition, various references in the decision to "Cheese Factory" should read "Cheesecake Factory." These inadvertent errors do not affect our decision.

[2] For the reasons stated by the judge, we find that the Respondent violated Sec. 8(a)(3) and (1) by terminating employee Michael Tangy. We reject the Respondent's argument that under *Town & Country Electric, Inc. v. NLRB*, 34 F.3d 625, 628-629 (8th Cir. 1994), cert. granted 115 S.Ct. 933 (Jan. 23, 1995), Tangy is not a bona fide employee entitled to the protections of the Act. In *Town & Country*, the Eighth Circuit reversed the Board and found that certain applicants for employment were not bona fide "employees" because they were: (1) encouraged by the union to apply with and to organize the employer's employees; (2) subsidized by the union; and, most importantly, (3) were subject to the union's salting resolution requiring them, among other things, to leave the employer on the union''s request. Here, however, Tangy secured his own employment with the Respondent and, thereafter, was contacted by the Union about organizing the Respondent's employees. In addition, Tangy was not paid by the Union and there is no evidence of a broad salting resolution in effect, similar to that in *Town & Country*. Accordingly, we find that, *Town & Country Electric Inc. v. NLRB* is not applicable.

We also reject the Respondent's argument that under *James Luterbach Construction Co.*, 315 NLRB 976 (1994), it is not bound to the current NECA-Union Inside Wireman master agreement because it only committed itself to the agreement in effect when it signed Letter of Assent-A. In *Luterbach*, the Board made clear that "there can be cases where the employer has expressly given continuing consent to bargain a successor contract on a multiemployer basis." Id. at fn. 11, citing *Kephart Plumbing*, 285 NLRB 612 (1987); *Reliable Electric Co.*, 286 NLRB 834, 836 (1987). Here, as in Reliable Electric, the Respondent affirmatively bound itself to successor agreements, including the current master contract, by the express terms of the Letter of Assent-A.

by the Respondent, "D. L. Baker, Inc." We agree with the judge's findings and rely particularly on the following facts.

When Daniel Baker began his electrical business in 1976 he apparently began operations under the name D. L. Baker, Electrical Contractor. In July 1976, however, Baker incorporated his business as D. L. Baker, Inc., listing his wife, Holly Baker, as president in the articles of incorporation.

Although Baker continued, at least occasionally, to advertise his business as D. L. Baker, Electrical Contractor, there is no evidence that after July 1976 he operated in any legal form other than Respondent corporation. There is also no evidence or claim that Holly Baker served as president of any other company.

On October 29, 1976, Daniel Baker agreed to execute the Letter of Assent-A, and Holly Baker signed it and the benefit fund agreement as president. Although "D. L. Baker, Electrical Contractor" was listed as the employing entity on the Letter of Assent-A,[3] the Bakers did not claim that they operated different legal entities, or that Holly Baker was committing Daniel Baker, individually, rather than the Respondent corporation, to the Union's master agreement. Moreover, when the Union contacted Daniel Baker in 1976 and early 1977 to determine whether he needed referrals from the Union's hiring hall, Baker did not claim that the Letter of Assent-A did not bind the Respondent. Rather, he promised to use the Union's hiring hall when and if he needed electricians. Finally, in his prehearing affidavit, Baker indicated that the Letter of Assent-A bound the Respondent, stating that "My ex-wife who was the president of the *company at the time*, had signed the letter of assent A in 1976." (Emphasis added.)

Accordingly, on these bases and those found by the judge, we reject the Respondent's argument that it is not a party to, or bound by, the Letter of Assent-A and benefit fund agreement.

REMEDY

[3]No company name was listed on the benefit fund agreement.

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily discharged employee Michael Tangy, will be ordered to offer him reinstatement and to make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of Tangy's discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

To remedy the 8(a)(5) and (1) violations, we shall order the Respondent to comply with the exclusive hiring hall provisions and other terms and conditions of employment in the current NECA-Union Inside Wireman master agreement, and to offer full and immediate employment to those individuals on the Union's out-of-work list who, on and since August 7, 1993, were denied an opportunity to work for the Respondent because of its failure and refusal to comply with the hiring hall provisions, as provided in *J. E. Brown Electric*, 315 NLRB 620 (1994).[4] In addition, we shall order the Respondent, for the period beginning August 7, 1993, to make whole its employees in the bargaining unit, as well as those individuals who were denied an opportunity to work, for any losses suffered as a result of its failure to abide by the applicable NECA-Union Inside Wireman master agreement as provided in *R. L. Reisinger Co.*, 312 NLRB 915 (1993), and *Williams Pipeline Co.*, 315 NLRB 630 (1994). We shall further order the Respondent to make whole these employees and individuals by making all required fringe benefit contributions that have not been made since August 7, 1993, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979),[5]

[4]For the reasons stated in the concurring opinion in *J. E. Brown*, above, Member Cohen would not grant this general reinstatement order.

[5]To the extent that an employee or individual who is entitled to relief, as described above, has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's contributions during the period since August 7,

(continued...)

and by reimbursing the employees and individuals for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to employees are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, above.[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, D. L. Baker, Inc., t/a Baker Electric, Vienna, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated. Washington, D.C. May 8, 1995

Margaret A. Browning, Member

Charles I. Cohen, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5](...continued)
1993, the Respondent will reimburse the employee or individual, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund. *Donovan & Associates*, 316 NLRB No. 34 fn. 2 (Jan. 27, 1995).

[6]Member Browning, based on the judge's findings that the Respondent raised several frivolous defenses, and distorted and misrepresented the evidence in its brief to the judge, would issue a notice to show cause why the Board should not order the Respondent to pay the litigation expenses of the General Counsel and the Charging Party. *See Tiidee Products, Inc.*, 194 NLRB 1234, 1236-1237 (1972).

Dean L. Burrell and, *Nathan W. Albright Esqs.*, for the General Counsel.
J. Raymond Sparrow, Jr., Esq. (*Shumate, Kraftson & Sparrow*), of Reston, Virginia, for the Respondent.
Brian A. Powers, Esq. (*O'Donoghue & O'Donoghue*), of Washington, D.C., for the Union.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These cases were tried in Arlington, Virginia, on October 3-4, 1994. A charge against D. L. Baker, Inc., t/a Baker Electric (the Respondent or Company) was filed in Case 5-CA-24131 on December 27, 1993[1] and in Case 5-CA-24190 on January 31, 1994 (amended February 25). Complaints were issued February 7 and March 17, 1994, and consolidated May 19, 1994.

The Company, operating as a nonunion electrical contractor, hired both union and nonunion electricians. On December 1 union employee Michael Tangy met at lunch with several nonunion electricians and campaigned for the Union in the presence of Foreman Jeffrey Cummings. Tangy told the employees that if they were interested in the benefits of union membership to meet him at his truck at quitting time for more information.

After working until 3 p.m., Tangy met two of the electricians at his truck and gave each of them an authorization card and a union contact book. Cummings came up, "out of breath," and said he was glad that he caught Tangy to save Tangy a ride in the next morning. As Tangy credibly testified, Cummings explained that during his daily reports to President/Owner Daniel L. Baker, "he had inadvertently mentioned our lunchtime conversation [about the Union] and that the

[1]All dates are in 1993 unless otherwise indicated.

owner became furious and directed him to tell me to find another job."

Soon after Tangy's discharge the Union found, in its dormant files of about 300 inactive contractors, Section 8(f) prehire agreements that Baker had failed to honor.

The primary issues are whether the Company, (a) unlawfully discharged Tangy for supporting the Union, (b) coerced employees by interrogating them and informing them that Tangy was discharged for union activity, and (c) unlawfully refused to recognize the Union and failed and refused to honor the 8(f) prehire agreements in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Company, and Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, has been engaged as an electrical contractor in the construction industry from its office in Vienna, Virginia. It admits in a questionnaire on commerce dated January 27, 1994 (G.C.Exh. 3), that in the last 12 months its gross amount of purchases of materials or services directly from outside the State exceeded $50,000 and its gross revenue from all sales or performance of services equaled or exceeded a million dollars. I find that it is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act and that the Union, Local Union No. 12, International Brotherhood of Electrical Workers, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Discharge of Michael Tangy*

1. Campaigning for the Union

Michael Tangy had been a member of the Union for 16 years and had been granted journeyman electrician licenses in Virginia, District of Columbia, and Maryland. During a shortage of union work, he had been employed on several nonunion jobs and had experience performing school renovation work. (Tr. 20, 55; G.C. Ech. 5.)

In early September the Company employed him at $13 an hour (substantially below the Union's $21.45 rate) to install conduit and lights in the Company's school work in Fairfax County. (Tr. 21, 58-59; G.C. Exhs. 5, 16 p.12.) President Baker, who employed both union and nonunion electricians, disclaimed any discrimination in hiring employees (Tr. 166, 233-235).

Tangy worked at the West Springfield Elementary School about 3 weeks (Tr. 21), until he was needed at the Weyanoke Elementary School where the work was behind schedule. Baker transferred him to Weyanoke "to assist the job being run and hopefully brought back onto schedule" (Tr. 218). Baker admitted at the trial that Foreman Cummings later told him that Cummings felt that Tangy was "essential to me because he knows more about the job than anyone else here" (Tr. 222).

In early November Union Organizer Charles Graham talked to Tangy at work about organizing the nonunion electricians and invited him to attend an organizing class at the union hall. Tangy took the course and began campaigning on the job to get union support. He concealed his union activity from the Company until December 1, when he invited several nonunion employees to meet with him at the 12 to 12:30 lunch break for more information about the Union. (Tr. 22-27, 46-48, 67-70, 174-178.)

Tangy proceeded with the meeting about 12:10 p.m., even though Foreman Cummings had come into the room by then (Tr. 27-28, 48, 84-85).

With Cummings listening, Tangy told the electricians present that he had talked to some union officials who were interested in organizing them. He described union wages and schooling, medical, and journeyman-upgrade benefits. Cummings spoke up and said he had worked 23 years straight for one nonunion contractor and "never missed a day," whereas "his experience with unions" was that union journeymen "were usually out of work a lot" and unions "don't offer everything that they promise." (Tr. 26, 28-29.)

Tangy responded that union companies "were starting to get their work back." He argued that at his age, 40, "I'm more productive due to my experience being in the trade that long, but I have less to show for it as far as wages and benefits. . . . I'm getting along in life and I'm looking at more things that I want to have at the end of my working career like a pension and some things to go along with it like the schooling." He added that if the employees were interested in the benefits of union membership, more information about the Union was in the union contact book. They could meet him at his truck at quitting time, look at the book, and ask him questions. (Tr. 29, 49, 87; G.C. Exh. 6.)

The electricians worked until 3 p.m., when Tangy met two of them at his truck in the parking lot. He gave each of them an authorization card to sign and a contact book. (Tr. 30-31, 86.)

2. His discharge

The two electricians at Tangy's truck on December 1 were looking at the contact books and signing the authorization cards, as Tangy further credibly testified, when Foreman Cummings came up, "out of breath," and "said that he was glad that he caught me to save me a ride in for the next day." Tangy asked what he meant and Cummings said that during his daily reports to Owner Baker (over the telephone), "he had inadvertently mentioned [his and Tangy's] lunchtime conversation and that the owner became furious and directed him to tell me to find another job" — meaning that "I was fired." (Tr. 31.)

Tangy responded that "it doesn't make any sense to me." Cummings explained that "the owner didn't want any part of [union talk] on his job" and that Cummings "wasn't really crazy about unions either." Cummings said he was "sorry that it had happened, and he wished me good luck," and that was it. (Tr. 32.)

The next morning, December 2, as Organizer Graham credibly testified (Tr. 179), he received a telephone call from Tangy who

> said he got fired yesterday for handing out union literature and talking to the guys at lunchtime.
>
> Q. Did he go into any further detail than that?
> A. No, he just said that the foreman came out and said that he had called up Baker on the phone and told Baker that [Tangy] was talking about the Union and Baker said to get rid of him.

Both Tangy and Graham, by their demeanor on the stand, impressed me favorably as being truthful witnesses, trying to recall accurately what had happened.

3. Fabricated defense

President Daniel L. Baker clearly made false statements in his January 27, 1994 pretrial affidavit, given in the presence of the company counsel (G.C. Exh. 19; Tr. 238). Baker swore in paragraph 10, page 3, of the affidavit:

> Before we fired Tangy, I had no knowledge that he may have engaged in any type of union related activity. Cummings never said anything to me about Tangy making any comments about IBEW Local 26.

To the contrary, belying Baker's purported lack of knowledge of Tangy's union activity, Foreman Cummings admitted at the trial (Tr. 136-138):

Q. BY MR. BURRELL: And you were present at lunch on December 1, 1993 when Mr. Tangy was talking about the union; is that correct?
A. Yes.
. . . .
Q. And later that day you called Mr. Dan Baker; is that correct?
A. Yes, sir.
. . . .
Q. And Mr. Baker wanted to know who was talking about the union on the job; is that correct?
A. Yes, sir.
Q. And you did not want to tell Mr. Baker who was talking about the union; is that correct?
A. Yes, sir.
. . . .
Q. Mr. Baker -- he asked you again and you told him that it was Mike Tangy; is that correct?
A. Yes.
Q. And you told Mr. Baker during that conversation that Tangy had been talking to the employees about the union; is that correct?
A. Yes, sir.

On further examination, however, Cummings appeared determined to avoid admitting that Baker told him to fire Tangy.

When *first* asked if Baker "told you to fire Mr. Tangy," Cummings claimed (Tr. 142) that Baker said, "I thought you fired him two weeks ago." When asked a *second* time. Cummings quoted Baker as saying (Tr. 143), "Well, if you took care of that we wouldn't have this problem." When Cummings gave an evasive answer the third time, repeating, "if I had taken care of it" (Tr. 143), I asked the witness, "Could you answer the question directly, please?" When he evaded the question the *sixth* and *ninth* times, I asked both times if he would please answer the question directly. (Tr. 144-145.)

I finally pointed out, "We're not making much progress if you try to evade the question." Then, the 10th time, he answered, "Yes, sir" to whether he was "given a directive to fire Mr. Tangy to take care of it." He admitted that he fired Tangy "in a matter of minutes" after talking to Baker and that he had to run out to the parking lot "to catch him." (Tr. 145-146.)

Baker, in turn, gave testimony that belies Cummings' claim that Baker told him on December 1, "I thought you fired him two weeks ago," and "Well, if you took care of [firing Tangy] that we wouldn't have this problem." In doing so, however, Baker clearly gave fabricated testimony.

Baker testified that Tangy had taken too long to install, as an "extra," a security switch about the third week in November. Baker claimed that Foreman Cummings had written out a ticket on it and that the school board "refused to pay for it because of the amount of hours that were involved in it." Baker claimed that he then (about the third week in November) told Cummings to "get rid" of Tangy, but Cummings said that Tangy "is still in the library extension" and "knows more about what is going on there than anybody I have on the job." Baker further claimed that Cummings asked, "can I keep him through the extension [emphasis added]?" and Baker answered, "Fine." (Tr. 225-226.)

Similarly on cross-examination, Baker claimed that yes, he made the decision to fire Tangy at the time of the security door device incident, but that Cummings told him, "No, I want to wait until the . . . library extension [emphasis added] is complete" (Tr. 239).

I note that in his pretrial affidavit (G.C. Exh. 19 p. 3) Baker claimed that Cummings wanted to keep Tangy until the completion of the library and Baker agreed that he could keep Tangy until the library was finished. I also note that at one point at the trial (Tr. 239), Baker falsely claimed that when Cummings telephoned him on December 1, he told Cummings, "Fire him, the library [emphasis added] is complete."

Obviously, if this testimony were true, Baker would not have told Cummings on December 1 that "I thought you fired [Tangy] two weeks ago."

Baker further claimed that on the morning of December 1 (before the lunchtime meeting in which Tangy campaigned for the Union), Baker and Cummings "talked about the library extension drawing to an end, as far as the rough-in stages of it," and they decided "that was the day to let [Tangy] loose, to let him go": yes, "Go ahead and fire him" (Tr. 226-228). Thus, according to this testimony, the decision to "let him go" was made that morning -- not shortly before quitting time that afternoon as Cummings admitted. (The Union argues in its brief, at 37, that "Baker and Cummings could not even get their own stories straight.")

In fact, as the evidence developed, (a) the bill for installation of the security switch was not sent until December 16 (a month after Tangy installed the security switch on November 16 and over 2 weeks after Tangy's summary discharge), (b) Baker admitted that the Company was not notified of the refusal to pay until June 1994 (months after the discharge), and (c) on December 1 there was much remaining work to be done, both in the library and the library extension, as well as a shortage of electricians on the project (G.C. Exh. 17, pp. 21-24, G.C. Exh. 18; Tr. 33-36, 85-86, 241-251, 270-271, 278).

I note that although Baker testified that Cummings informed him it took Tangy 6 or 7 hours to install the security switch, the Company in December sent a bill that charged for "Labor: Foreman . . . 11 hours at 38.50 ea . . . $423.50," plus "Materials . . . $65." totaling $488.50 and rejected as a "ridiculous bill" (Tr. 255, 257-261, 270-271; G.C. Exh. 20). I also note that Cummings claimed that at the time of the incident, Baker screamed, "I can only bill an hour, hour and a half for that (security-switch) ticket" (Tr. 153).

Tangy credibly testified that the reason for the extra time required to install the door security switch in the completed area of the library was duct work in the way, above the door, concealed by the ceiling tile that was already in place. He had to knock out cinder block

to reach the source of the circuit, and the cleanup took him over an hour. (Tr. 40-42.)

Despite the Company's claim that Baker wanted to get rid of Tangy when he installed the security switch, Tangy was not given any warning of discipline or discharge (Tr. 51-53). Cummings admitted (Tr. 153) that he did not "discuss with Mr. Tangy the performance relating to this item."

The only warning Tangy received during his employment at the Company was an oral one by Baker in early November, when Tangy decided -- without prior clearance by Foreman Cummings -- to place an outlet on a different circuit, with additional parts from the material storage area. After Cummings made the assignment, Tangy learned that the assigned circuit would be overloaded when a large toaster for high-volume school lunches was used in the kitchen. He made the change to comply with the electrical code. (Tr. 37-40, 51-53, 79.) I discredit Baker's claim that Tangy did not mention an overload and "the only thing that Mr. Tangy said is that he wandered all over the school looking for materials" (Tr. 223).

I also discredit Cummings' claim that Tangy stated at the December 1 lunchtime meeting that he was "thinking about" taking a union job that night (Tr. 141) and that when Cummings fired him later that afternoon in the parking lot, Tangy said, "Don't worry about it. I got a job" (Tr. 156-157). Cummings admitted that there is no mention in his pretrial affidavit about Tangy having taken a union job (Tr. 160) and Tangy credibly denied that anything was said about his having another job (Tr. 284).

By their demeanor on the stand, both Owner Baker and Foreman Cummings impressed me as being willing to give any testimony that might appear plausible to support the Company's cause.

After considering the grossly conflicting testimony of Baker and Cummings, Baker's pretrial affidavit, and all the evidence, I find that the Company fabricated the defense that it had already decided to discharge Tangy before the October 1 lunchtime meeting.

4. Concluding findings

The Company contends in its brief (at 54) that the evidence "overwhelmingly establishes" that it discharged Tangy for his "poor performance" — even though it is undisputed that Foreman Cummings made no mention of poor performance when summarily discharging Tangy (Tr. 50).

In making this contention, the Company disregards Tangy's credited testimony that Foreman Cummings admitted President Baker's discriminatory motivation in directing Cummings to discharge Tangy on December 1 for discussing the Union earlier that day at the lunchtime meeting. It ignores the gross conflicts in Baker's and Cummings' testimony, purporting to prove that the decision to discharge Tangy had already been made before the meeting. It also ignores Tangy's credited testimony about the problems that arose on the job. It relies instead on the less trustworthy versions given by Baker and Cummings.

Particularly in view of Foreman Cummings' admission of discriminatory motivation, I find that the General Counsel has made a prima facie showing that Tangy's organizing for the Union at the December 1 lunchtime meeting was a motivating factor in the Company's decision to summarily discharge him at quitting time that same day. *Wright Line*, 251 NLRB 1083 (1980).

I further find that the Company has failed to meet its burden of proof that it would have discharged Tangy in the absence of his union support. Based on Tangy's credited testimony, I agree with the Union that Tangy was a "thorough and conscientious worker," who reacted in a reasonable fashion to problems on the job that required initiative to do the job right and within the requirements of the electrical code, and that "but for his union activity, Tangy never would have been fired."

I therefore find that the Company discriminatorily discharged Michael Tangy on December 1, 1993, for supporting the Union, in violation of Section 8(a)(3) and (1) of the Act.

B. *Coercive Conduct*

Two nonunion electricians, Earl Jewel and Russell St. Claire (Tr. 30-31), were present on December 1 when Foreman Cummings summarily discharged Tangy, telling him that President Baker had become furious when told that Tangy had talked about the Union earlier that day at the lunch break and had directed Cummings to discharge him. The admission of that discriminatory reason for discharging Tangy undoubtedly tended to coerce the two nonunion employees in the exercise their rights under Section 7 of the Act.

I therefore find, as alleged, that the Company coerced employees by informing them that Tangy was discharged because of his union-related activity, violating Section 8(a)(1).

Cummings admitted that later that day or the following day, when most of the employees did not want to talk about the Union or Tangy's firing, he asked employees if Tangy had talked to them about the Union. He also admitted that he told them "that they ought to think about it." (Tr. 138, 157.) I find it clear that this interrogation, in the context of the admitted discriminatory discharge of Tangy for supporting the Union, likewise tended be coercive.

I therefore find, as alleged, that the Company coercively interrogated employees about whether they had been approached to join the Union, violating Section 8(a)(1).

C. *Failure to Honor 8(f) Prehire Agreements*

1. Commitment to become union contractor

Shortly after the Company discharged Michael Tangy on December 1, the Union discovered that Daniel L. Baker had previously committed himself in 8(f) prehire agreements to become a union contractor, but had failed to abide by the commitment.

Business Manager Cecil Satterfield had asked Organizer Graham (a business representative whose official title in the Union is assistant business/manager/organizer) to go through the dormant files

of about 300 inactive contractors. At the time, the Union had about 180 active contractors in its jurisdiction, which covers 27 counties in Virginia, the District of Columbia, 5 counties in Maryland, and 3 counties in West Virginia. (Tr. 180-182, 188, 190.)

As Graham began checking the inactive files, he came across the name of D. L. Baker. In Baker's file he found the prehire agreements, a "Letter of Assent-A" and a "Benefit Fund Agreement," both signed on October 29, 1976 (Tr. 181; G.C. Exhs. 8, 9).

Beginning in 1965, Baker had worked as a nonmember of the Union until 1967, when he obtained his union membership. As he testified, "I worked for E. C. Ernst [Electric Co., a union contractor] for the period of 11 years during that time. In 1976 I went out on my own, where I am presently." (Tr. 217; R. Ech. 1.) He initially adopted the firm name of D. L. Baker Electrical Contractor, a sole proprietorship (G.C. Exh. 11).

On October 29, 1976, at the invitation of Wade Sheriff, who was then the business manager of the Local, Baker went with his wife Holly to Sheriff's office and agreed to be a union contractor. Baker said that his wife would be president of the company and take care of the books and he would do the work himself, because "he really didn't have that much work" at that time. Sheriff gave them a packet of material for review, discussed the NECA-Union agreement and referral procedure, and answered questions about the trust funds. When showing the letter of assent to them, he explained the termination provision, requiring notification of NECA and the local union 150 days prior to the current anniversary of the NECA-Union agreement. (Tr. 97-98, 100-102, 105.)

Baker asked in the October 29, 1976 meeting whether he could continue to participate (as a union member) in the health and welfare fund. Sheriff told him no, that once he hired someone, he could no longer participate in the funds "being as he was an employer" — except for a 9-month grace period. He could, however, get the International's benefits if he continued paying his union dues. (Tr. 105, 117-119.)

Neither a sole proprietor nor a corporation makes contributions to the benefit funds until "you have employees" (Tr. 106).

In this October 29, 1976 meeting, Baker misled Sheriff into believing that Baker's firm was still a sole proprietorship. When they exchanged business cards, Baker gave Sheriff a card bearing the initial firm name of D. L. Baker Electrical Contractor (Tr. 103; G.C. Ech. 11). In fact, however, his firm was no longer a sole proprietorship. The evidence shows that the business had been incorporated 3 months earlier, on July 29, 1976 (6 days after Baker's last day of work at Ernst Electric, R. Ech. 1), under the name of D. L. Baker, Incorporated. The articles of incorporation (G.C. Ech. 4) show that Holly Baker was then the president and Daniel L. Baker, the secretary-treasurer of the corporation.

I note that in an apparent effort to conceal Baker's misrepresentation that his firm was still a sole proprietorship, the Company goes outside the record in its brief (at 17). There the Company contends -- without supporting evidence -- that "Sheriff informed Dan Baker in October 1976 that he could no longer participate in the Union in an incorporated form of ownership" and that was the reason the letter of assent and benefit fund agreement were executed in the name of Baker's sole proprietorship. To the contrary, as found, Sheriff explained to Baker that even as a sole proprietorship, Baker could not continue participation in the Union's health and welfare plan, "being as he was an employer." Making no mention of whether Baker's firm was incorporated or not, Sheriff told Baker that he could as an individual get the International's benefits if he continued to pay his union dues. The Union did not learn until sometime after December 8, 1993, as discussed below, that Baker's firm had been incorporated.

2. Documents signed

The Company's president, Holly Baker, in Baker's presence (Tr. 99-100), signed the following two Section 8(f) prehire agreements. She signed as president, but under the firm name of D. L. Baker, Elec. Contractor -- the name of the former sole proprietorship before the firm became a company named D. L. Baker, Incorporated.

The "Letter of Assent-A" (G.C. Ech. 8) authorizes the Washington, D.C. Chapter, National Electrical Contractors Association (NECA) as the employer's collective-bargaining representative for all matters pertaining to the current "Inside" labor agreement with IBEW Local 26. It specifically provides that this authorization, "in compliance with the current approved labor agreement," shall become effective October 29, 1976, and remain in effect "until terminated by the undersigned employer giving written notice" to NECA and the Local at least 150 days "prior to the then current anniversary date" of the labor agreement.

The "Benefit Fund Agreement" (G.C. Ech. 9) certifies that the "undersigned employer has examined a copy of the labor agreement" between NECA and the Local and has been furnished copies of the trust agreements of the Pension Trust Fund, the Health and Welfare Trust Fund, and the Joint Apprenticeship and Training Trust Fund. It provides that the employer "agrees to comply with and be bound by all of the terms and conditions of employment, wage and contribution rates . . . contained in or provided for" by the NECA-Union agreement and trust agreements "and all proper and approved amendments" insofar as "they are applicable under the terms" of the labor agreement. It further provides that *this agreement* shall be in effect from August 29, 1976 until August 31, 1978 and from "year to year until *either party* gives written notice to the other of a decision to terminate the agreement according to the provisions in the Letter of Assent."

Sheriff and Graham credibly testified, without objection at the trial, that NECA and the Union have negotiated successive collective-bargaining agreements from 1976 to the present. (Tr. 109, 186-188; G.C. Exhs. 10, 16.)

The current Inside Wireman Agreement between NECA and Local 26 (G.C. Ech. 16), a master agreement, provides in section 2.03 and 2.19 for exclusive recognition of the Union in an appropriate unit. It provides in section 1.01 and 1.02 that the agreement is effective from June 1, 1993 until May 31, 1997, is automatically renewed from year to year unless terminated or changed by the required notification in writing, and shall "remain in full force and effect until a conclusion is

reached in the matter of proposed changes." It covers wages and working conditions and specifically provides in section 3.02 and 3.04 for the Union to be "the sole and exclusive source" of referrals, without discrimination "by reason of membership or nonmembership in the Union." It provides in articles 69 and 12 for contributions to the current benefit funds.

3. Promises to abide by commitment

Sheriff had at least two further conversations with Baker, the last one in January 1977. Baker said he still had not hired anyone. Sheriff said that when Baker got ready to hire, to be sure and call him. *Baker promised that he would.* (Tr. 106-107, 130.)

It is undisputed, as Sheriff credibly testified (Tr. 130), that in the January 1977 conversation, Baker claimed that he was working as a sole proprietor. Despite this misleading claim, I find that when Baker in that conversation promised to seek referrals from the Union when he needed employees, he was making the promise on behalf of the firm, which was incorporated the year before as D. L. Baker, Inc.

I note that in Baker's January 27, 1994 pretrial affidavit, discussed below (G.C. Ech. 19 p.4), he in effect admitted that in 1976, Holly Baker (then his wife) signed the letter of assent on behalf of the Company (without making any reference to the former sole proprietorship). He admitted: "My ex-wife, who was president of the company at the time, had signed the letter of assent A in 1976."

Meanwhile in the latter part of 1977, Baker stopped paying his union dues. The Union suspended him as a member on January 1, 1978, for failure to pay dues for 3 months. The Union notified him of the suspension and gave him an additional 3 months to pay the dues. Upon his continued failure to do so, the Union dropped his membership. (Tr. 126; R. Exh. 1.)

Neither Baker nor the Union ever terminated the letter of assent and benefit fund agreement by giving the required written notices at

least 150 days "prior to the then current anniversary, date" of the NECA-Union master agreement (Tr. 103, 107, 186-187).

The evidence does not reveal when Baker began hiring employees. Baker never told Sheriff (who served as business manager from 1976 to 1980 and from 1983 to 1989) that he had hired anyone, and it never came to Sheriff's attention in any way that Baker was hiring employees. Baker never asked the Union for referrals, never made contributions to the benefit funds, and never paid the union wages or applied the other terms of the NECA-Union agreement. (Tr. 12, 94, 106-108, 113-114, 185.)

The first time that Graham, who became the assistant business manager/organizer in July 1992, became familiar with Baker's firm and aware that it was hiring employees, was (as he credibly testified) around September 1993. Seeing an ad in the newspaper for electricians, Graham "called the ad." The phone was answered, "D. L. Baker." Graham then asked some unemployed union members if they were interested in seeking employment there for the purpose of organizing. They agreed, but he did not hear whether they were hired. (Tr. 173-174, 187-188.)

When Graham in December 1993 came across "D. L. Baker" in the inactive files and found the letter of assent and benefit fund agreement, he sent a letter dated December 8 to Baker at D. L. Baker Elec. Contractor (the sole proprietorship) -- not knowing that 3 months before the agreements were signed in 1976, Baker had incorporated the firm. Graham attached copies of those agreements to his letter, requested compliance with the referral and trust fund provisions, and sought recognition for a "long and fruitful bargaining relationship." He received no response. He later corresponded with Baker at Baker Electric, the trading name of D. L. Baker, Inc. (G.C. Exhs. 13-15; Tr. 181-185).

4. Baker's additional false statements

President Baker made further false statements in his pretrial affidavit that he gave on January 27, 1994 (G.C. Ech. 19), in the

presence of the company counsel. In addition to the above-cited false statements in the same affidavit concerning the discharge of Tangy, Baker claimed on page 4:

> My ex-wife, who was president of the company at the time, had signed the letter of assent A in 1976. However, because of *some problems* that I had afterwards *getting good people from the union*, I went and talked to Wade Sheriff, the business agent back in early 1977. Based on our conversation and my complaint, I received a *letter of termination* from the IBEW in early 1977 and since 1977 I have had no union affiliation. Before I received the termination letter from the Union, I was adhering to the *union security clause*, I was doing the dues checkoff, and I was *making contributions to the benefit and pension plans*. Since 1977 I have made none of these contributions nor have I hired through the union hall. [Emphasis added.]

Baker did not repeat or support these false claims at the trial. The evidence is clear that (a) Baker did not complain to Sheriff about not getting good people (he never sought any referrals), (b) Baker did not get "a letter of termination from the IBEW in early 1977" (the letter in April 1978 merely dropped Baker's personal membership in the Union), and (c) Baker never honored the union-security clause, never made dues checkoffs, and never made contributions to the benefit and pension plans.

5. Controlling precedents

The principal issue is whether the 8(f) prehire letter of assent and benefit fund agreement are enforceable after the Company failed to honor them for a substantial number of years and hired employees without calling the Union for referrals as promised.

The General Counsel and the Union cite cases they consider controlling precedents.

In *Neosho Construction Co.*, 305 NLRB 100, 101 (1991), the employer failed for 14 years (from 1976 to 1990) to abide by its 1975

8(f) stipulation that it would honor the current master agreement and "all future master agreements for the duration of the stipulation." The employer had failed to terminate the stipulation by providing the required written notice "prior to the anniversary date." In April 1990 Assistant Business Agent Jim Fuller observed the employer's employees on a job. Then, much the same as in the present case:

> When Fuller returned to the Union's office, he discovered the 1975 contract stipulation in the Union's files. Having concluded following a search of the Union's files that the stipulation had never been terminated, Fuller telephoned [Vice President Robert Becker] to request that the current master agreement be applied [to the project]. Becker told Fuller that he was unaware of the stipulation. . . .
>
> On May 4 [1990] Becker wrote to Fuller explaining . . . that any agreement with the Union "was clearly an individual 8(f) agreement which has long expired."
>
> After receiving Becker's letter, Fuller telephoned Becker and insisted that the [employer] was bound by the 1975 stipulation. Nevertheless, [the employer] denied that it is bound by the stipulation and has refused to apply the terms of the current master agreement.

The administrative law judge found, 305 NLRB at 103, that the employer violated Section 8(a)(1) and (5) by failing to abide by the terms of the collective-bargaining agreement and by withdrawing union recognition. The Board, 305 NLRB at 100 fn. 1, held:

> In affirming the judge, we additionally rely on *Cedar Valley Corp.*, 302 NLRB 823 (1991). In *Cedar Valley* the Board adopted the judge's decision that the employer was bound to an 8(f) contract by virtue of automatic renewal clauses to which it had agreed with various unions, despite the fact that the employer had not complied with the subsequent agreements for a significant number of years.

Enforcing the Board's Decision and Order in *Cedar Valley Corp. v. NLRB*, 977 F.2d 1211, 1220 (8th Cir. 1992), the court held:

> Cedar Valley argues that the lack of a continuous relationship between it and the complaining unions makes the [finding that Cedar Valley was bound to successive agreements between the association and the unions] tenuous. However, *we find no link between periods of inactivity among the parties and the enforceability of the agreements*. [Emphasis added.]

The Company in its brief ignores the court's decision and refers to the Board's decisions in *Neosho Construction* and *Cedar Valley* only in a footnote (at 26 fn. 56), arguing that they are inapposite. As discussed below, I do not find the argument persuasive.

I agree that these cases are controlling on the issue of whether successive 8(f) prehire agreements are enforceable despite the passage of time.

6. Multiple unfounded defenses

The Company asserts the following 10 defenses, which I find lacking in merit.

Defense 1. Violation of State Law. The Company contends in its brief (at 46) that the NECA-Union master agreement, providing that the Union is the exclusive collective-bargaining representative, violates Virginia's right-to-work statute, which prohibits a denial of work because of membership or nonmembership in a labor union. It cites no supporting authority and ignores the provision in the master agreement that referrals shall be made without discrimination "by reason of membership or nonmembership in the Union."

I reject the contention as frivolous.

Defense 2. All Documents Not in Evidence. After making no objection at the trial to the introduction of testimony regarding the successive master agreements and the introduction into evidence of two

of the agreements (including the current one), the letter of assent, and the benefit trust agreement, the Company belatedly contends in its brief (at 7-10) that the complaint must be dismissed because all the documents are not in evidence.

To the contrary, I find that the issue is whether the October 29, 1976 8(f) prehire letter of assent and benefit fund agreement are binding on the Company, not the detailed terms of the successive master agreements and the various trust agreements provided for in those labor agreements. The current master agreement in evidence, effective from June 1, 1993 until May 31, 1997, details the current contractual benefits and the current negotiated contributions to the benefit funds.

I find that the record evidence suffices and that the documents are sufficiently identified for compliance with any order that may be issued.

Defense 3. No Board Jurisdiction. The Company contends (at 10-12) that the Board lacks jurisdiction in this case because (a) the General Counsel failed to present evidence that the Company's activities "affect" commerce and (b) the Company's admission in a questionnaire on commerce dated January 24, 1994, that in the last 12 months its direct inflow was $50,000 and gross revenue equaled or exceeded a million dollars is insufficient.

I reject the contention as frivolous.

Defense 4. No Majority. The Company contends (at 13-14) that the General Counsel has not proved that the Union represents a majority of the employees and therefore the complaint must be dismissed. The complaint does not alleged [sic] a majority which, of course, is not required for enforcement of a 8(f) prehire agreement. *John Deklewa & Sons*, 282 NLRB 1375, 1387 (1987).

I reject the contention as frivolous.

Defense 5. *Wrong Respondent.* As found, President Baker on October 29, 1976, misled Business Manager Sheriff into believing that

Baker's firm was a sole proprietorship, when in fact the firm had been incorporated 3 months before under a different name. The Company in its brief (at 15-18) contends that the complaint must be dismissed because the letter of assent and benefit fund agreement were signed on behalf of the sole proprietorship, D L. Baker Elec. Contractor, and not on behalf of the Company, D. L. Baker, Inc., a separate entity.

The Union did not learn the correct name of Baker's firm by the time Business Representative Graham wrote Baker on December 8, 1993, requesting compliance with the agreements. Graham sent the letter to Baker at D. L. Baker Elec. Contractor, the firm name that appears on the letter of assent and benefit fund agreement. Graham learned later that Baker's firm was trading as Baker Electric, where he sent other correspondence to Baker.

In the meantime, as further found, when Baker promised Sheriff in January 1977 to seek referrals from the Union when he needed employees, Baker made the promise on behalf of his firm, which had been incorporated on July 29, 1976. Baker misled Sheriff into believing that he was still working as a sole proprietor. Moreover, as found, Baker in effect admitted in his pretrial affidavit that the letter of assent was signed on behalf of the Company.

I find that the Company is a party to the letter of assent and benefit fund agreement.

Defense 6. Two-Year Organizing Campaign. As found, Assistant Business Manager/Organizer Graham credibly testified that the first time he became familiar with Baker's firm was in September 1993, when he called an ad in the newspaper for electricians and the phone was answered, "D. L. Baker." As he remembered (Tr. 174), the names of volunteer organizers he sent to seek employment at the Company were John Lasley, Tommy Lynch, and Wayne Shifflet. He did not learn whether they were hired.

When a question was raised at the trial about whether these employees were hired by the Company, the parties' counsel apparently checked the employee personnel records in the courtroom, because the

company counsel then stated for the record that Lasley and Shifflet were hired (Tr. 200-201).

Although the personnel records were available and not introduced, the Company has gone outside the record and attached to its brief purported copies of Lasley's and Shifflet's records. The Company argues in its brief (at 19-22) that the Union had been engaged in an extensive organizing campaign 2 years before September 1993, during which time the Union had recognized the Company as a nonunion contractor, "not bound by the alleged series of collective bargaining agreements." It bases its argument on the fact that the purported copy of Lasley's record shows that Lasley started work on September 25, 1991.

There is, of course, no evidence that Graham sent Lasley as a volunteer organizer to apply for employment in 1991. Graham did not become an organizer for the Union until July 1992, 10 months after Lasley was hired (Tr. 173, 182). Neither is there any evidence that Graham sent Shifflet as a volunteer organizer before September 1993. According to Shifflet's purported personnel record, he was hired on October 15, 1992 -- over a year after Lasley was hired. He was terminated January 5, 1993, about 8 months before Graham credibly testified that he asked unemployed union members if they wanted to seek employment at Baker's firm. There is no indication that the Union was engaging in "an extensive organizing campaign," or any organizing campaign, at the Company before September 1993.

I reject the Company's contention that the Union had engaged in a 2-year "extensive organizing campaign" at the Company.

(Contrary to the urging of the General Counsel and the Union, I find no necessity to strike the improperly filed attachment to the Company's brief.)

Defense 7. Inconsistent Conduct. The Company contends in its brief (at 19-20) that the Union's subsequent organizing efforts in 1994 and its reference to Baker Electric (R. Ech. 2) as a nonunion shop (after Baker failed to respond to Graham's December 8, 1993 letter

seeking recognition and compliance with the 1976 letter of assent and benefit fund agreement), "are wholly inconsistent with the Union's allegation that [the Company,], was already bound by a collective bargaining agreement."

I find, instead, that the Union's conduct merely reflects an understanding that Baker had been operating as a nonunion contractor, that Baker was refusing to honor his 1976 commitment to be a union contractor, and that it appeared appropriate under these circumstances to organize Baker's employees.

Defense 8. No Proof of Trust Agreements. The Company contends in its brief (at 27-28) that the Union and the General Counsel have failed to prove that the initial benefit fund agreements existed, what the terms of those benefit fund agreements were, and that properly approved amendments to them exist.

To the contrary, I find that the issue is whether the October 29, 1976 letter of assent and benefit fund agreement are binding on the Company, not the detailed terms of the past or present trust agreements. If the Company is found to be bound by the letter of assent and benefit fund agreement, any unresolved disputes over the terms of the current trust agreements could be resolved in a compliance proceeding.

Defense 9. No Proof of Binding Contracts. The Company contends in its brief (at 28-30) that the Union and General Counsel have failed to meet their burden of persuasion that the letter of assent and the series of collective-bargaining agreements are currently in effect and binding on Baker, Inc. I find that this is essentially a repeat of Defense 2, that all the documents must be placed in evidence. I do not agree.

In making this contention, the Company engages in an apparently deliberate distortion. In the brief (at 30) the Company makes the unequivocal statement: "Mr. Sheriff, serving as a Union business manager for almost 17 years, also testified on direct examination that it was a practice for contractors to sign more than one Letter of Assent." It cites lines 5-7 on page 112 of the transcript, ignoring the preceding question and answer and the three following questions and

answers, which clearly show that the witness misunderstood the question (Tr. 111-112):

> Q. If a contractor signs a Letter of Assent in 1976, is it necessary or is it your practice to have that contractor sign additional Letter of Assent as the years go on?
>
> A. No, he does not, because that continues on after one agreement to the next agreement. It's not necessary to sign every time the agreement changes.
>
> Q. And, in fact, is it your practice to request a contractor to sign more than the initial Letter of Assent?
>
> A. Yes. [Emphasis added.]
>
> Q. Let me make sure . . . . you understand my question. In other words, is it your practice once the initial Letter of Assent is signed is that the only Letter of Assent you require?
>
> A. Yes.
>
> Q. Okay. So you don't ask them to sign additional ones?
>
> A. Oh, no. Not -- you mean, like year after year?
>
> Q. Yes.
>
> A. No, no, you sign the first one and then that binds you. It isn't necessary to sign any future ones.

Defense 10. No Compliance with Grievance Procedure. The Company contends in its brief (at 30-31) that the Union's failure to comply with the grievance procedure in the master agreement requires dismissal of the complaint. In view, however, of the Company's continued denial that it is bound by the agreement and its obvious unwillingness to recognize the Union and follow the grievance procedure. I reject the contention as unfounded.

7. Additional defenses

a. The Union itself terminated the agreements

The Company contends (at 22-24) that the Union was aware that the 1976 letter of assent and the benefit fund agreement were not

being complied with in the years 1976 through early 1978 and that the Union first suspended and then terminated D. L. Baker Electrical Contractor's union status (terminating the agreements). I find this contention to be a complete distortion of the evidence.

The Union was not aware, contrary to the Company's contention in its brief (at 22-23), "that the Sole Proprietorship was openly not complying with the letter of assent." To the contrary, Baker told Sheriff in January 1977 that he still had not hired anyone. The Union was not aware of any employees having been hired.

The Company's contention in its brief (at 23) is also untrue, that the Union "first suspended and then terminated the Sole Proprietorship's union status." The Company's own exhibit (R. Ech. 1) is Baker's membership card, which shows that it was Baker's personal membership that was suspended on January 4, 1978, and dropped on April 1, 1978. The reverse side of the membership card shows that the Union referred Baker to "E. C. Ernst (NIH, Bldgs. 31 and 32)" on May 22, 1967 (Tr. 126), and that Baker last worked there on July 23, 1976, and was terminated July 26, 1976, to take another job. There is no reference anywhere on the membership card to D. L. Baker Electrical Contractor, the sole proprietorship.

The Company misrepresents the evidence by contending in its brief (at 23) that Sheriff "testified that he was aware that union contributions had not been made for the first three months in 1978, that the *Sole Proprietorship* was suspended from union membership and then dropped on April 1, 1978." (Emphasis added.) The Company cites page 126, lines 26 of the transcript. I find it obvious that Sheriff was not referring to the sole proprietorship's failure to make contributions to the Union's benefit funds, but to Baker's failure to pay his union dues:

> THE WITNESS: Okay. Dan [Baker] was suspended. That means he hadn't paid his dues for three months in 1/4/78. So he was notified that he was suspended and given an additional three months and when he didn't pay them, he was

dropped in 4/1/78. Now, this is a union record [referring to Baker's membership card, R. Exh. 1].

The Company further (at 23) misrepresents the evidence by contending that "Sheriff also testified that *termination letters* [emphasis added] were sent to the Sole Proprietorship regarding the failure to make union contributions." The Union did not send any termination letters to terminate the letter of assent and benefit fund agreement. Again, the Company is referring to the January 4, 1978 suspension letter that the Union sent to "Mr. Baker" and the April 1, 1978 letter to him, dropping his union membership.

To questions asked by the company counsel on cross-examination (revealing the counsel's understanding at the trial), Sheriff answered (Tr. 127):

> Q. BY Mr. SPARROW: Now, Mr. Sheriff, you testified you're aware that letters *were sent to Mr. Baker regarding the failure to pay dues*?
>
> A. Yeah.
>
> Q. And those letters were subsequent to October of 1976; is that correct?
>
> A. Well, it happened after he went into business. [Emphasis added.]

Of course, a new employer is not required to maintain his union membership to be a union contractor.

I note that in the next sentence in the brief (at 23-24), the Company contends that "This [purported testimony by Sheriff that termination letters were sent in 1978 for failure to make union contributions] is consistent with the statement in Mr. Baker's affidavit [G.C. Ech. 19] that he received letters terminating the union status in the *late 1970s* [emphasis added]." The Company is referring to Baker's statement, "I received a letter of termination from the IBEW in early 1977 [emphasis added]" which, as found above, is one of the false statements made in the pretrial affidavit, given in the presence of the company counsel.

Based on these misrepresentations of the evidence, the Company reaches the obviously false conclusion in its brief (at 24) that

> It was the Union which terminated and treated as repudiated the union status of the Sole Proprietorship under the letter of assent and benefit fund agreement. This repudiation by the Union was done clearly, openly and unmistakably in *1978* [emphasis added] as testified by Mr. Sheriff.

The accompanying footnote 48 further distorts the evidence. In it the Company contends that Sheriff's testimony that "the Sole Proprietorship failed to make required contributions" (to the benefit funds) contradicts his testimony that Baker, Inc. had no employees. First, as found, Sheriff did not testify that the sole proprietorship failed to make required contributions to the benefit funds, because he did not know that Baker had hired any employees and because he was testifying about Baker's failure to continue paying his union dues. Second, Sheriff had not been advised that "Baker, Inc." (D. L. Baker, Inc.) was the employer. The Company then reached the obviously false conclusion in the footnote that

> the Union expected the Sole Proprietorship to make contributions and when it did not, terminated its union relationship with the Sole Proprietorship. It also suggests that the Union knew that the Sole Proprietorship had employees prior to and in early 1978.

To the contrary, Sheriff credibly testified that about December 1993, about 2 months after the agreements were signed, the trust funds sent Baker the benefit forms to fill out. Sheriff called Baker and asked him if he was ready to hire anybody, and Baker said he was not. Sheriff then informed the trust funds not to send any more Paperwork to Baker until Sheriff notified them that Baker had hired employees. (Tr. 106.)

I infer that if Sheriff had known that Baker had begun hiring employees, the Union would have sought to enforce the agreements then, instead of waiting until now.

I note that the Company repeats in its brief this obviously false conclusion (that the Union itself terminated the prehire agreements) and its false argument about an extensive organizing campaign for 2 years before September 1993, as unpersuasive bases for distinguishing the Board decisions in *Cedar Valley* and *Neosho Construction* (found above to be controlling precedents). The Company contends (at 26, fn. 56):

> The facts here are inapposite to those set forth in those decisions. For example, it is the Union which *terminated the union relationship* here; it is the Union that testified that it had *knowledge that Baker, Inc. was overtly and openly failing to make fund contributions in 1978*; it was the Union which sent *termination letters*; and it was the Union who has engaged in *extensive organizing activities of Baker, Inc. since September 1991*. None of these facts were present in the decisions cited.

I infer that these gross misrepresentations and distortions of evidence in the brief were deliberate, and I consider them an abuse of the Board processes. The brief was signed and submitted by the company counsel, J. Raymond Sparrow Jr. The Board may want to take appropriate action to discourage such an abuse.

b: *No binding agreements*

(1) Union knowledge

The Company disputes the denials by Wade Sheriff, the former business manager, and Charles Graham, the current assistant business manager/organizer, that they had any knowledge that President Baker's firm employed employees before September 1993. That was the date, as found, when Graham called a newspaper ad for electricians and heard the phone being answered, "D. L. Baker."

The Company, however, offered no direct evidence that the Union was aware before then that Baker had employed any employees.

On surrebuttal, after the parties had rested and all the witnesses had testified, the company counsel recalled Baker to the stand and asked (Tr. 286):

> Q. BY Mr. SPARROW: Mr. Baker, had there been times in the past years as D. L. Baker, Incorporated where your company has been *reported to the Union as being a nonunion contractor working on a Union project*? [Emphasis added.]

Over vigorous protests by opposing counsel. I overruled the objections and permitted the question to be answered (Tr. 286-28, 289).

Baker then claimed there were three such instances. First, in later '70s or very early 1980, "Union representatives" were brought into the National Press Building where Walter Truland was the prime electrical contractor. Second, at the Washington Cheese Factory, there were "Union representatives" out there at the jobsite where Dyna Electric was the electrical contractor. Third, at Montgomery Mall, "Union representatives" were out there. (Tr. 288-289.)

As the evidence was developed on cross-examination, in none of these instances was it shown that the Union itself was aware that employees of D. L. Baker, Inc. were on the job.

At the National Press Building, the purported "Union representatives" were an unknown person who may have been the union contractor's union steward and who may not have known "what company [Baker] was working for" (Tr. 290 291, 299-300). At the Washington Cheese Factory, Baker claimed that his foreman told him that "they" (the union representatives) had been on the job. Even if this were true, there is no evidence that "they" knew that it was Baker's firm that was the nonunion electrical contractor (Tr. 292-293).

At Montgomery Mall, in 1984 or 1985, the purported "Union representatives" turned out to be the union contractor's general superintendent, who recognized Baker and questioned the ability of his firm to be "in the switch gear." Baker first claimed that the general

superintendent, who "was in charge of the renovation of the mall," was "representing the Union" and "presented himself" as a representative of IBEW Local 26. (Tr. 293-294.) Baker next claimed that the general superintendent said that he worked "for" Local 26 (Tr. 295). I infer that the union contractor's general superintendent was more likely a union member or supporter, rather than a union representative in any official capacity, whose knowledge of Baker's presence on the job would be imputed to the Union.

I therefore find that this evidence does not prove that in past years, the Company (in the words of the company counsel) "has been reported to the Union as being a nonunion contractor on a Union project."

As further proof that the Union had knowledge that it employed employees since October 1976, the Company misrepresents the evidence by contending in its brief (at 25) that

> At the hearing, there was uncontroverted testimony that Baker, Inc. had been listed in *numerous* Dodge Reports, a service which reports on construction activities in the area. The uncontroverted testimony was that there have been *five major* projects for which Baker, Inc. was identified in the Dodge Reports in the past five years. [Emphasis added, footnotes omitted.]

To the contrary, there is no evidence that the Company was listed "numerous" times or that there have been "five major projects" on which the Company was identified. The "uncontroverted testimony" consists of the following (Tr. 235-236):

> Q. Mr. Baker, has your company ever been identified in Dodge Reports with respect to a project?
>
> A. Yes, sir.
>
> Q. On what occasions?
>
> A. We did a restaurant called the Cheesecake Factory, which is located on Wisconsin Avenue, and the four schools that we were awarded were all in the Dodge Reports. There

> may [emphasis added] have been other occasions, other than this, but I know that those five projects were in the Dodge Report. I saw them.
>
> Q. Okay, and those are in the last two years, is that — those projects?
>
> A. The Cheesecake Factor has been approximately three and a half to four years, the schools were in the last two years.

There is no evidence of the dollar volume of any of these five contract. Baker later testified (Tr. 288) that Dyna Electric was the union electrical contractor on one of them, the "Cheesecake Factory" restaurant job, leaving "tenant build-out" electrical work for Baker's company to perform (evidently not a "major project" for the Company). I infer that the Weyanoke Elementary School job (from which Tangy was discharged) was one of the four school jobs. There is no evidence that the Dodge Report on any of these four schools was published longer than the 10(b) 6-month limitation period before the February 7, 1994 service of the charge.

The evidence does not indicate that anyone in the Union checking the Dodge Reports was aware of Baker's 1976 letter of assent in the dormant files of hundreds of inactive contractors when the Cheesecake Factory job was purportedly listed about 1990, 14 years later. Sheriff was no longer the business manager. His office in the Union expired in 1989.

The Union had relied on Baker's promises and commitment that he would call the Union for referrals when he needed employees. Not having heard anything from Baker after checking back with him two or more times since the signing of the October 29, 1976 prehire agreements, the Union had placed Baker's file among the files of the many other inactive contractors. As Sheriff testified, only about 50 percent of the union members who go out on their own, as Baker did, succeed in making "a go at it" (Tr. 111). There was no reason for Sheriff to suspect that Baker was reneging on his promises and operating nonunion.

I credit the denials of Sheriff and Graham that they had any knowledge that President Baker's firm was employing employees. I have no reason to find from the evidence (Tr. 122-123, 210-215) that the Union would necessarily be aware that any Dodge Report, which identified the Company as D. L. Baker, Baker Electric, or however it may have been listed, involved one of the contractors in the inactive files.

(2) Applicable precedents

The evidence show's that on an undisclosed date, which clearly would be more than 6 months before the February 7, 1994 service of the charge, the Company began hiring employees without called [sic] the Union for referrals and otherwise honoring the 8(f) prehire agreements. This conduct, which is alleged to be an unlawful failure and refusal to bargain, would clearly be outside the 10(b) 6-month limitation period that began on August 7, 1993.

As held in *A & L Underground*, 302 NLRB 467, 469 (1991), however, "The Board's long-settled rule [is] that the [10(b) 6-month limitation] period commences only when a party has clear and unequivocal notice of a violation of the Act and that "the burden of showing that the charging party was on clear and unequivocal notice of the violation rests on the respondent."

In the above-cited *Neosho Construction* case, 305 NLRB 100, 101-103 (1991), during the 14 years that the employer failed to abide by its 1975 8(f) stipulation to honor the current master agreement, the employer performed as prime contractor or subcontractor on 20 jobs in the union's contract area. Eighteen of the jobs ranged in size from $ 100,000 to $ 2328 million in volume. "Union Agent Jacobs, who held office during all but 3 of the 14-year period involved, denied that he ever became aware that [the employer] performed any work falling under the Union's jurisdiction" until Assistant Business Agent Fuller discovered the employer's employees on a job.

The judge concluded, 305 NLRB at 103, that "it appears highly questionable whether [the employer's] prior conduct or noncompliance

was sufficiently 'bald' to put [the union] on notice of its intent to repudiate the 1975 stipulation" and found a violation of Section 8(a)(1) and (5). The Board affirmed the judge's decision.

8. Concluding findings

Daniel L. Baker had worked 11 years for a union contractor — 2 years as a nonmember of the Union before he joined the Union in 1967.

As he testified, "In 1976 I went out on my own, where I am presently."

He last worked for the union contractor on July 23, 1976. After that, as found, he first worked as a sole proprietorship, using a firm name of D. L. Baker Electrical Contractor. On July 29, 1976, however, he incorporated the business under the name of D. L. Baker, Inc. and used the trading name of Baker Electric.

On October 29, 1976, when he was still the only electrician performing the work, he entered into 8(f) prehire agreements with the Union, promising to be a union contractor and to call the Union for referrals when he needed to hire electricians. When doing so, he misled the Union into believing that his firm was still a sole proprietorship. His wife, who was the president of D. L. Baker, Inc., signed the agreements as president of D. L. Baker, Elec. Contractor. As found, the Company is a party to the prehire agreements.

Assuming that Baker entered into the prehire agreements in good faith, intending to become a union contractor when he began hiring electricians (although he entered into the agreements as a sole proprietor, after the business had been incorporated 3 months), he later decided not to honor the prehire agreements. He began operating as a nonunion contractor on an undisclosed date, without giving the Union and NECA the required timely notices to terminate the prehire agreements.

Under their terms these agreements, the letter of assent and benefit fund agreement, remained in effect. NECA (authorized in the letter of assent to represent Baker) and the Union continued to negotiate successive agreements, which Baker was obligated to honor.

Baker succeeded in operating nonunion without discover, by the Union until September 1993, when Organizer Graham called Baker's newspaper ad for electricians and the phone was answered. "D. L. Baker." On December 8, after Organizer Graham found the name D. L. Baker in the files of inactive contractors, he wrote Baker seeking recognition and compliance with the prehire agreements. Baker did not respond to the letter, and there is no evidence that since then he has given the required timely notices to NECA and the Union for terminating the prehire agreements.

I find that the charge in this case was timely filed under Section 10(b) of the Act. Company has failed to sustain its burden of showing that the Union was on "clear and unequivocal notice" that the Company was operating nonunion, reneging on its commitment that when it began hiring employees, it would call the Union for referrals and operate as a union contractor, abiding by the provisions of the master agreement. I also find that the Company's conduct and noncompliance with the 8(f) prehire agreements were not sufficiently "bald" to put the Union on notice of its intent to repudiate the agreements.

I therefore find, as alleged in the complaint, that since August 7, 1993 (6 months before service of the charge on February 7, 1994), the Company has failed and refused to adhere to the terms of the 1993-1997 NECA-Union Inside Wireman master agreement, violating Section 8(a)(5) and (1) of the Act.

I also find that since December 9, 1993, when the Company failed to respond to the Union's December 8, 1993 letter, the Company has refused to recognize the Union as bargaining representative of the employees in the contractual appropriate unit (G.C. Ech. 16, sec. 2.03, 2.19), violating Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

1. By discriminatorily discharging Michael Tangy on December 1, 1993, for supporting the Union, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By coercively interrogating employees and informing employees that it discharged Tangy because of his union-related activity, the Company violated Section 8(a)(1).

3. By failing and refusing since August 7. 1993, to adhere to the terms of the 1993-1997 NECA-Union Inside Wireman master agreement and to comply with the hiring hall provisions, the Company violated Section 8(a)(5) and (1).

4. By refusing since December 9, 1993, to recognize the Union as the representative of the employees in an appropriate bargaining unit, the Company violated Section 8(a)(5) and (1).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employee Michael Tangy, it must be ordered to offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

To remedy the 8(a)(5) and (1) violations, the Respondent must be ordered (1) to comply with the exclusive hiring hall provisions and the terms and conditions of employment in the current NECA-Union Inside Wireman master agreement and (2) to offer full and immediate employment to those individuals on the Union's out of work list who on

and since August 7, 1993, were denied an opportunity to work for the Respondent because of its failure and refusal to comply with the hiring hall provisions, as provided in *J. E. Brown Electric*, 315 NLRB 620 (1994).

The Respondent must also be ordered for the period beginning August 7, 1993, (3) to make whole its employees in the bargaining unit, as well as those individuals who were denied an opportunity to work, for losses suffered as a result of its failure and refusal to pay contractual wage rates and fringe benefits in the current master agreement, as provided in *R. L. Reisinger Co.*, 312 NLRB 915 (1993), and *Williams Pipeline Co.*, 315 NLRB 630 (1994), (4) to reimburse these employees and individuals for any expenses ensuing from its failure to make the required contributions to the benefit funds, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), and (5) to make whole the appropriate fringe benefit trust funds for losses suffered, by making contributions to the funds to the extent that contributions would have been made on behalf of these employees and individuals if it had complied with the current master agreement, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The amounts are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons*, above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, D. L. Baker, Inc., t/a Baker Electric, Vienna, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[2]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discharging or otherwise discriminating against any employee for supporting Local Union No. 26, International Brotherhood of Electrical Workers, or any other union.

(b) Coercively interrogating any employee about union support or union activities, or informing any employee that an employee has been discharged because of his union support.

© Refusing to recognize the Union and comply with the hiring hall provisions and the terms and conditions of employment in the current NECA-Union Inside Wireman master agreement.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Michael Tangy immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

© Offer full and immediate employment to those individuals on the Union's out of work list who on and since August 7, 1993, were denied an opportunity to work for the Respondent because of its failure and refusal to comply with the hiring hall provisions in the current NECA-Union Inside Wireman master agreement.

(d) For the period beginning August 7, 1993, make whole its employees in the bargaining unit, as well as those individuals who were

denied an opportunity to work, for losses suffered as a result of its failure and refusal to adhere to the master agreement; reimburse them for any expenses ensuing from its failure to make the required contributions to the benefit funds; and make whole the benefit trust funds for losses suffered, in the manner set forth in the remedy section of the decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its current jobsites and its place of business in Vienna, Virginia, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. December 21, 1994

[3]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local Union No. 26, International Brotherhood of Electrical Workers, or any other union.

WE WILL NOT coercively question you about your union support or activities, or inform you that an employee has been discharged for supporting the Union.

WE WILL NOT refuse to recognize the Union or comply with the hiring hall provisions and the terms and conditions of employment in the NECA-Union Inside Wireman master agreement.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Michael Tangy immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL offer full and intermediate employment to any individuals who would have been hired through the Union's hiring hall since August 7, 1993, and make them and our other employees whole for any losses and expenses, resulting from our refusal to honor the current master agreement with the Union, including contributions to the trust funds, plus interest.

D. L. BAKER, INC., T/A BAKER ELECTRIC

(2)

Supreme Court, U.S.
FILED
DEC 1 1997
CLERK

No. 97-577

In the Supreme Court of the United States

OCTOBER TERM, 1997

D. L. BAKER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1788

QUESTIONS PRESENTED

Whether the National Labor Relations Board correctly determined that petitioner was bound by the terms of a prehire agreement with the union.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the decision is noted at 105 F.3d 647 (Table). The decision and order of the National Labor Relations Board (Pet. App. 11a-15a) and the decision and recommended order of the administrative law judge (Pet. App. 16a-54a) are reported at 317 N.L.R.B. 335.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1997. A petition for rehearing was denied on June 11, 1997 (Pet. App. 9a-10a). The time for filing a petition for a writ of certiorari was extended to

September 30, 1997, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. To accommodate "the uniquely temporary, transitory, and sometimes seasonal nature of much of the employment in the construction industry," *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260, 266 (1983), Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), authorizes an employer engaged in that industry to enter into a collective bargaining agreement with a union that has not established its majority status within the relevant bargaining unit. Such agreements are known as "prehire" contracts. Section 8(f) also permits an election challenge at any time to the representative status of a union that is a party to such a contract, whether or not the contract itself is still in effect.

In 1971, the National Labor Relations Board (Board) held that an employer's unilateral repudiation of a prehire agreement did not violate the statutory bargaining obligations of Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), unless the complaining union could demonstrate its majority status. *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 694 (1971), reversed and remanded *sub nom. Local No. 150, Int'l Union of Operating Engineers* v. *NLRB*, 480 F.2d 1186, 1188-1191 (D.C. Cir. 1973). In *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335 (1978) (*Higdon*), this Court upheld that general policy and sustained the Board's more specific determination that the Act forbids picketing by a minority union to enforce a prehire agreement that the employer refuses to honor, because the picketing "effectively has

the object of attaining recognition as the bargaining representative," notwithstanding the lack of a showing of majority support. *Id.* at 341. The Court found that the Board's position—that a prehire agreement is "voidable" and "does not have the same stature as a collective-bargaining agreement" until and unless the contracting union "attains majority support in the relevant unit"—was "an acceptable reading of the statutory language," even though it was "perhaps not the only tenable" construction of the Act. *Ibid.*

Subsequently, in *McNeff*, the Court held that an employer's obligations under a prehire contract with a minority union are enforceable in an action under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, if the employer had "never manifested an intention to void or repudiate the contract" before the Section 301 action was filed. 461 U.S. at 270-271. The Court explained: "The concerns with the § 7 rights of employees to select their own bargaining representative and our fidelity to Congress' intent that prehire agreements be voluntary—and voidable—that led to our decision in *Higdon* are not present in this case. Union enforcement, by way of a § 301 suit, of monetary obligations incurred by an employer under a prehire contract prior to its repudiation does not impair the right of employees to select their own bargaining agent." *Id.* at 269. The Court found it unnecessary to decide "what specific acts would effect the repudiation of a prehire agreement—sending notice to the union, engaging in activity overtly and completely inconsistent with contractual obligations, or * * * precipitating a representation election pursuant to the final proviso in § 8(f) that shows the union does not enjoy majority support." *Id.* at 270 n.11. The Court held, however,

that mere covert noncompliance with the agreement was insufficient to relieve the employer of its contractual obligations. See *id.* at 263-264, 270.

b. In *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375 (1987) (*Deklewa*), enforced *sub nom. International Ass'n of Bridge Workers* v. *NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988), the Board overruled its earlier position—adopted in *R.J. Smith* and upheld in *Higdon*—that an employer has a unilateral right to repudiate a prehire agreement with a union that has not acquired majority status. Section 8(f), the Board explained, requires striking a reasonable balance between protecting employee free choice and maintaining industrial stability in the construction industry. Based on its detailed analysis of the effects of the *R.J. Smith* rule, the Board concluded that it could best strike that balance by holding that neither party to a voluntary prehire agreement may unilaterally repudiate it until the agreement expires or the unit employees vote to reject or change their bargaining representative. *Id.* at 1379-1389.

Every court of appeals that has considered the validity of the *Deklewa* rule on the merits has upheld it as a reasonable construction of the Act. See *C.E.K. Indus. Mechanical Contractors, Inc.* v. *NLRB*, 921 F.2d 350, 356-357 (1st Cir. 1990); *International Ass'n of Bridge Workers* v. *NLRB*, 843 F.2d 770, 776-780 (3d Cir.), cert. denied, 488 U.S. 889 (1988); *NLRB* v. *Bufco Corp.*, 899 F.2d 608, 611 (7th Cir. 1990); *NLRB* v. *W.L. Miller Co.*, 871 F.2d 745, 747-748 (8th Cir. 1989); *Mesa Verde Constr. Co.* v. *Northern California Dist. Council of Laborers*, 861 F.2d 1124, 1131-1134 (9th Cir. 1988) (en banc); *NLRB* v. *Viola Indus.-Elevator Div., Inc.*, 979 F.2d 1384, 1394-1395, 1397 (10th Cir. 1992)

(en banc); see also *Local No. 150, Int'l Union of Operating Engineers* v. *NLRB*, 480 F.2d 1186, 1188-1191 (D.C. Cir. 1973) (disapproving Board's pre-*Deklewa* holding in *R.J. Smith*); note 3, *infra*. See generally *Auciello Iron Works, Inc.* v. *NLRB*, 116 S. Ct. 1754, 1759 (1996) (Board is due "considerable deference" in "develop[ing] national labor policy through interstitial rulemaking") (internal citation omitted).

2. In July 1976, union electrician Daniel Baker incorporated his own business as D.L. Baker, Inc., which appears as petitioner in this case. Pet. App. 13a, 27a-28a. In October 1976, petitioner's president executed certain "me too" documents—a letter of assent and a benefit fund agreement—binding petitioner to the terms of a "master agreement" between a multiemployer bargaining association (the Association) and Local 26, International Brotherhood of Electrical Workers (the Union). See *id.* at 6a-7a & n.4, 13a, 27a-30a. The letter of assent authorizes the Association to act as the employer's bargaining agent and provides that that authorization shall remain in effect until petitioner terminates it by giving written notice to the Association and the Union at least 150 days "prior to the then current anniversary date" of the master agreement. *Id.* at 29a. Similarly, the benefit fund agreement provides, by its terms, that it will remain in effect from "year to year until either party gives written notice to the other of a decision to terminate the agreement according to the provisions in the Letter of Assent." *Ibid.*; see also *id.* at 7a n.4.

At the interview during which the "me too" documents were executed, Baker led the Union to believe that his business was still a sole proprietorship and that he intended to perform all the work himself, at least for the time being. Pet. App. 27a-28a.

Baker thereafter promised that, when he began hiring employees, he would notify the Union and secure referrals from the union hiring hall, as required by the master agreement. *Id.* at 13a, 29a-30a. Although Baker himself stopped paying union dues in 1977 and was suspended from union membership in 1978, neither he nor petitioner gave notice of any intent to terminate petitioner's obligations under the self-renewing "me too" documents. *Id.* at 30a-31a, 48a-49a. Nor did Baker or petitioner notify the Union when petitioner began hiring employees in disregard of its hiring hall obligations. *Id.* at 29a, 31a, 46a-49a. In 1993, after discovering that petitioner was advertising for employees in violation of the master agreement, the Union unsuccessfully asked petitioner to adhere to that agreement and to recognize the Union as bargaining representative. *Id.* at 31a, 49a.

3. The Union filed unfair labor practice charges with the Board. An administrative law judge (ALJ) determined that petitioner had bound itself to the master agreement; that it had failed to comply with the notice requirements of the termination provisions in the "me too" documents; and that it had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by violating the terms of the current master agreement and by refusing to recognize the Union as the bargaining representative of its employees. Pet. App. 12a-13a, 28a-31a, 48a-49a.[1] The Board adopted the ALJ's recommended order. *Id.* at 14a-15a, 51a-54a.

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[1] The ALJ specifically rejected many factual arguments that petitioner repeats here as though they were not resolved against it. Compare Pet. 4-7 with Pet. App. 28a, 36a-39a. The Board and the ALJ also determined that petitioner had engaged in a variety of other unfair labor practices (see Pet.

4. In an unpublished per curiam decision, the court of appeals affirmed the Board's unfair labor practice findings and enforced its order. Pet. App. 1a-8a. The court rejected petitioner's contention that "by sixteen years of 'notorious' nonunion operations" it had repudiated its obligations under the master agreement between the Association and the Union. *Id.* at 6a. The court acknowledged that the ALJ had decided the Section 8(f) issue under *Deklewa*, but, on the ground that the Fourth Circuit "has not adopted *Deklewa*," it analyzed the case under its own pre-*Deklewa* precedent of *Clark* v. *Ryan*, 818 F.2d 1102, 1107 (4th Cir. 1987). Pet. App. 6a n.3.[2] The court held that, under *Clark* and *McNeff*, a Section 8(f) prehire agreement is binding until repudiated and that "acts sufficient to repudiate the prehire agreement require at least that the Union have some form of notice of the inconsistent conduct." *Id.* at 6a. The court found such notice absent here because, as the ALJ had found, petitioner had succeeded in operating nonunion without detection by the Union until 1993, and there was no reason for the Union to suspect earlier that "Baker was reneging on his promises." *Ibid.*; see also *id.* at 43a, 46a-47a. In sum, the court concluded, "we must reject [petitioner's] argument that its conduct prior to September 1993 was sufficiently 'notorious' to repudiate the contract." *Id.* at 6a.

The court also held that petitioner "was bound to the current § 8(f) agreement by virtue of renewal

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App. 12a n.2, 17a-26a), but those determinations are not at issue here.

[2] The court noted that it would have reached the same result if it had applied the distinct analysis set forth in *Deklewa*. Pet. App. 6a n.3.

clauses contained in both 'me-too' documents, as well as in each § 8(f) agreement." Pet. App. 7a & n.4 (footnote omitted) (citing *Local 257, Int'l Bhd. of Elec. Workers* v. *Grimm*, 786 F.2d 342, 345-346 (8th Cir. 1986); *NLRB* v. *Black*, 709 F.2d 939, 940-941 (5th Cir. 1983); *Nelson Elec.* v. *NLRB*, 638 F.2d 965, 967-968 (6th Cir. 1981)). Finally, the court agreed with the Board that petitioner was bound by the "me too" documents that petitioner's president had executed, even though she had signed in the name of Baker's sole proprietorship. *Id.* at 8a n.5.

ARGUMENT

As the court of appeals correctly observed (Pet. App. 6a n.3), the ALJ—and, in adopting the ALJ's opinion, the Board—decided this unfair labor practice case under the Board's 1987 decision in *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375, enforced *sub nom. International Ass'n of Bridge Workers* v. *NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988). See Pet. App. 32a-35a (applying *Deklewa* and its progeny). As discussed above, *Deklewa* holds that an employer (or a union) that is party to a prehire agreement violates Section 8(a)(5) of the Act (or its union analogue, Section 8(b)(3)) if it unilaterally repudiates that agreement before it expires or the unit employees oust the union as their bargaining representative. 282 N.L.R.B. at 1379-1389. *Deklewa* thus overruled the Board's earlier *R.J. Smith* rule (see p. 2, *supra*) permitting unilateral repudiations of prehire agreements. That earlier rule had been the subject of, and the foundation for, this Court's decisions in *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 350 (1978) (*Higdon*),

and *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260 (1983). See pp. 2-3, *supra*.

Petitioner's essential claim—that it was entitled to repudiate its agreement with the union by disregarding its contractual obligations—rests on the tacit premise that this case should be decided under the pre-*Deklewa* regulatory regime at issue in *McNeff*. Similarly, the court of appeals decisions that petitioner cites in support of its position (see, *e.g.*, Pet. 10-14) also applied pre-*Deklewa* law. Those same courts have also recognized, however, that *R.J. Smith* has been overruled and that *Deklewa* represents a substantial but permissible change in the Board's implementation of Section 8(f). See, *e.g.*, *Mesa Verde Constr. Co.* v. *Northern California Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (en banc); *NLRB* v. *W.L. Miller Co.*, 871 F.2d 745, 748 (8th Cir. 1989); *NLRB* v. *Viola Indus.-Elevator Div., Inc.*, 979 F.2d 1384, 1392-1394 (10th Cir. 1992) (en banc); cf. *Sheet Metal Workers Local Union No. 54* v. *E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1472 n.8 (5th Cir. 1993) (holding that *Deklewa*, if valid, is not retroactive), cert. denied, 510 U.S. 1117 (1994); see generally pp. 4-5, *supra*.[3]

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[3] Although this Court upheld the *R.J. Smith* rule in *Higdon* and further addressed some of the consequences of that rule in *McNeff*, the Court also recognized that the rule, while "acceptable," was "perhaps not the only tenable" construction of the Act. *Higdon*, 434 U.S. at 341. As the courts of appeals that have addressed the validity of *Deklewa* have recognized, this Court's approval of *R.J. Smith* did not preclude the Board from reconsidering its own precedent in this area or from replacing *R.J. Smith* with what the Board, based on its empirical judgment, has found to be a more reasonable implementation of Section 8(f). See generally *NLRB* v. *J. Weingarten*,

Because petitioner's claim is based on a pre-*Deklewa* body of law that is neither applicable to this case nor of continuing practical significance, that claim is unworthy of this Court's review. First, *Deklewa* unambiguously compels the result that the court of appeals reached here. Under *Deklewa*, petitioner had no unilateral right to repudiate its contractual obligations with the Union. Thus, its repudiation of those obligations, no matter how "overt" (see Pet. i (questions presented)), was an unfair labor practice under Section 8(a)(5).[4] Because the Board

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Inc., 420 U.S. 251, 265-266 (1975); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-864 (1984); compare *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 536-537 (1992) (where statute "speaks to [an] issue" under step one of *Chevron*, agency is bound by court's determination of statute's "clear meaning"). In *Industrial TurnAround Corp.* v. *NLRB*, 115 F.3d 248 (1997), a panel of the Fourth Circuit held that it was bound by considerations of *stare decisis* to apply pre-*Deklewa* circuit precedent, but it held open the possibility that that court could approve *Deklewa* if it considers the issue en banc, as the Ninth Circuit did in *Mesa Verde*. See *id.* at 254-255; see also *Local Union 48 Sheet Metal Workers* v. *S.L. Pappas & Co.*, 106 F.3d 970, 975 (11th Cir. 1997) (similar approach in Section 301 context). The Board has moved that the Fourth Circuit address that issue en banc (if the court determines that it is otherwise presented) in *NLRB* v. *D.C. Mason Builders, Inc.*, No. 97-1414 (argued Oct. 31, 1997), and that motion is currently pending. In any event, this petition does not raise any issue concerning the validity of *Deklewa* or the Board's authority to overrule *R.J. Smith*, and, as we discuss below, petitioner would be jurisdictionally barred from raising such a challenge in this Court.

[4] Whether petitioner was free to repudiate its contractual obligations by disregarding them is a separate question from whether petitioner was free to invoke the termination clauses of the "me too" agreements by giving written notice to the

resolved this case under *Deklewa*, petitioner could prevail only if *Deklewa* were invalid or if it were inappropriate to apply *Deklewa* to this case. Petitioner failed to make such a claim before the Board, however, and that failure deprived the court of appeals (and also this Court) of jurisdiction to address any such claim on judicial review. See 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982).[5] Similarly, even in this Court,

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Association and the Union at least 150 days "prior to the then current anniversary date" of the master agreement. Pet. App. 29a; see p. 5, *supra*. Petitioner was contractually entitled to cancel the agreements by giving such notice; it simply chose not to do so.

[5] A copy of petitioner's Exceptions to the ALJ's decision, which it filed on appeal to the Board, has been lodged with this Court. In the court of appeals, petitioner argued that its repudiation of the Section 8(f) agreement was justified under pre-*Deklewa* law. The briefs of the Board (at 37-38, 41 n.10) and of the intervening Union (at 19-21) in the court of appeals argued that 29 U.S.C. 160(e) barred petitioner's reliance on pre-*Deklewa* law because, before the Board, petitioner had never challenged *Deklewa*'s validity or applicability. The court did not address the issue of that jurisdictional bar; instead, it applied pre-*Deklewa* law on the ground that the Fourth Circuit has not adopted *Deklewa*. See Pet. App. 6a n.3; see also note 3, *supra*. Although, in our view, the court should have explicitly rejected petitioner's claims under *Deklewa*, that point is immaterial because, as the court observed, "[t]he result * * * does not change under [either] rationale," *ibid.*, and because petitioner's failure before the Board to make an appropriate argument concerning controlling Board precedent independently justified the court's decision to affirm the Board's unfair labor practice determination and to enforce its order. See *NLRB* v. *Cheney California Lumber Co.*, 327 U.S. 385, 389 (1946) ("Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as

petitioner does not squarely challenge the validity or applicability of *Deklewa*.

In any event, even if pre-*Deklewa* law were applicable to this case, which it is not, any issue relating to that law would not merit this Court's review. For ten years, the Board and the courts have consistently applied *Deklewa* as binding law in adjudicating charges that an employer has engaged in unfair labor practices under Section 8(a)(5) by violating its contractual obligations under a prehire agreement. For that reason, petitioner's claims concerning pre-*Deklewa* law in this context, even if that law were for some reason applicable here, would be of rapidly diminishing practical significance.[6]

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to all issues that were contestable before the Board but were in fact not contested.").

[6] Petitioner claims (Pet. 10-16) that its noncompliance with its statutory obligations was sufficiently flagrant that, under the pre-*Deklewa* regime addressed in *McNeff*, that noncompliance released it from its obligations under the prehire agreements. Even on the assumption that pre-*Deklewa* law were applicable here, the court of appeals' rejection of that claim, as well as its determination (Pet. App. 7a) that petitioner "was bound to the current § 8(f) agreement by virtue of renewal clauses contained in both 'me-too documents,'" were factbound and correct. Moreover, the cases that petitioner cites as evidence of a circuit conflict on the proper application of pre-*Deklewa* law (Pet. 11-16) are factually distinguishable. In none of those cases was there a finding, as here, that the employer had concealed from the union its noncompliance with the prehire agreement. Finally, petitioner cites nothing to support its further contention (Pet. 16-21), which it did not raise below and which the court of appeals did not reach, that its agreement with the Union was "coerced" rather than voluntary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1997

(3)

No. 97-577

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

D.L. BAKER, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and LOCAL UNION NO. 6, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 97-577

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

D.L. BAKER, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Petitioner D.L. Baker, Inc. ("Baker") respectfully submits this reply to the brief of the respondent National Labor Relations Board ("Board") opposing Baker's petition for writ of certiorari.

MAINTENANCE OF THE 5-4 CIRCUIT CONFLICT BY DENIAL OF THE PETITION FOR WRIT OF CERTIORARI WILL COMPOUND THE UNCERTAINTY LEVEL FOR SMALL CONSTRUCTION EMPLOYERS INTENDING TO EXERCISE THEIR "UNDOUBTED RIGHT TO REPUDIATE" PREHIRE AGREEMENTS.

To enforce its order in the court below, the Board unquestionably had the burden to demonstrate that it had applied the extant holding of this Court in *Jim McNeff v. Todd*, 461 U.S. 260 (1983),

properly to the situation before it. As the Fourth Circuit found, the Board did not do so and hence the Fourth Circuit reviewed the decision in compliance with this Court's jurisprudence.

The Board's opposition here continues its position that *John Deklewa & Sons, Inc.*, 282 N.L.R.B. No. 184 (1987), is applicable to this case, opp. at 10, when the Fourth Circuit explicitly held that the case was *not*. 6a n.3. The Board's ALJ made only one passing reference to *Deklewa*, and that was when he rejected Petitioner's argument that the union needed to show majority support from the bargaining unit to permit enforcement of the prehire agreement. Pet. 35a.

In its presentation, the Board's opposition confirms the existence of a body of caselaw in the Fourth, Fifth, and Eleventh Circuits, *see Sheet Metal Workers Nat'l Coal Fund v. S.L. Pappas & Co., Inc.*, 106 F.3d 970, 973 (11th Cir. 1997), that have not accepted the Board's *Deklewa* ruling, whereas the First, Third, Seventh, Eighth, Ninth, and Tenth Circuits have. Furthermore, despite the Board's acknowledgement that it recently lost again on the applicability of *Deklewa* in the Fourth Circuit in *Industrial Turnaround Corp. v. NLRB*, 115 F.3d 248 (1997), opp. at 10 n.3, it has not sought to have this Court review the merits of the Fourth Circuit's refusal to acknowledge *Deklewa* by filing a petition for writ of certiorari in *Industrial Turnaround* or the instant case.[1]

The General Counsel's opposition goes further and asserts that the pre-*Deklewa* body of caselaw is not applicable here or "of continuing practical significance" to merit this Court's consideration. Opp. at 10. Since the Board acknowledges that only six

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[1]The case of *NLRB v. D.C. Mason Builders, Inc.*, 321 N.L.R.B. 1081 (1996), *on pet. for review*, No. 97-1414 (4th Cir.), which the Board states it had sought en banc review at p. 10 n.3 of its Opposition, had been resolved nine days before it filed its opposition brief. What the Board had filed was a motion for *hearing* en banc on October 21, 1997. The case was argued before a panel of the Fourth Circuit on October 31, 1997. On November 21, 1997, the Fourth Circuit denied the Board's motion for hearing en banc. The panel's opinion is pending. However, the case does not present a *Deklewa* issue as the Board suggests.

circuits have agreed with its position in *Deklewa*, opp. at 4-5, and two of those, the First and Ninth Circuits, *C.E.K. Ind. Mech. Contractors, Inc. v. NLRB*, 921 F.2d 350 (1st Cir. 1990), *Mesa Verde Const. Co. v. Northern Dist Council of Laborers*, 885 F.2d 594 (9th Cir. 1989), along with the Fifth Circuit, *Local Union 953 v. Mar-Len of Louisiana, Inc.*, 906 F.2d 200, 204 (5th Cir. 1990), hold the case will not be retroactively applied, then there is also a discrete and continuing conflict with the First, Fourth, Fifth, Ninth, and Eleventh Circuits on the Question Presented: whether an employer's repudiation of a pre-hire agreement formed prior to *Deklewa* in 1986 must be communicated to the union. These Courts will continue to apply the law of *Todd v. McNeff* and not *Deklewa*.[2]

On the contention that Petitioner can only prevail if *Deklewa* is "invalid" or "inappropriate to apply," Opp. at 11, the Board begs the question whether *Deklewa* was properly decided in the first instance. Since it has not acquiesced or sought review of that decision in this Court from every circuit that has agreed and disagreed with its position, the claim is not meritorious because the cases has been shielded from this Court's review.[3] Furthermore, *Deklewa* is inappropriate to apply in this case since the Fourth Circuit held it was inapplicable.[4]

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[2]The question has not been directly considered in the District of Columbia or the Second Circuit: *Wilson & Sons Heating & Plumbing, Inc. v. NLRB*, 971 F.2d 758 (D.C. Cir. 1992); *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310, 314 (2d Cir.), *cert. denied*, 498 U.S. 982 (1990).

[3]Noticeably absent from the Board's opposition is any attempt to explain statements made to the Court in its original opposition to certiorari in *Deklewa v. NLRB*, No. 88-70 (1988), that prehire agreements would continue to be voluntary, the case would not require involuntary recognition of the union as a bargaining agent, and that prehire agreements would continue to be of limited duration. Pet. at 15-16, 19 n.13.

[4]The Board also suggests that Petitioner failed to make the argument before the Board that pre-*Deklewa* law applied. Inasmuch as Baker's Exception 11 to the Board stated Dan Baker "decided not to honor the prehire agreement," the Board failed to address that argument when it was specifically made, the Fourth Circuit

(continued...)

On the Board's contention that Petitioner "does not squarely challenge the validity or applicability of *Deklewa*," opp. at 12, Petitioner agrees the legal question in this case does not involve *Deklewa* at all, but concerns whether the Fourth Circuit's interpretation of *McNeff v. Todd* that an effective act of repudiation requires actual notice of repudiation communicated to the minority union. Certainly, Section 8(f) of the Labor Act does not suggest that a Board-sponsored election is an exclusive mechanism for an employer to void a prehire agreement, a fact consistent with this Court's affirmation that either party to a prehire agreement is individually empowered "to exercise its undoubted right to repudiate a prehire agreement...." *McNeff*, 461 U.S. at 270. Neither does an employer's unilateral repudiation/termination of a prehire agreement advance, affect, nor diminish any Section 7 right.

Moreover, the Board's contention that the circuit conflict raised by cases cited in the Petition are otherwise distinguishable is not supported in this record or by a finding of fact that "the employer had concealed from the union its noncompliance with the prehire agreement." Opp. at 12 n.6, Rather, the record reveals that for sixteen years, both D.L. Baker, Electrical Contractor and D.L. Baker, Inc. were run openly and without concealment from the union. This is especially noticeable in the fact that Petitioner had sought and obtained contracts published in the Dodge reports and openly hired members of the local union as employees. 16a, 43a-46a. There would be no reason to conceal its operations from the union since Baker had long ago manifested the intention to repudiate the prehire agreement or as the ALJ concluded: "he later decided not to honor the prehire agreements." 48a. *Id.*

These factors coincide with Petitioner's demonstration that prehire agreements are regularly infected with elements of coercion,

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[4](...continued)
heard and decided the case thereon, and the Board has never demonstrated any receptivity to reconsider the argument, the argument is thin. The Board had notice of Petitioner's Exceptions; that is all that is required under Section 10(e) of the Act, 29 U.S.C. § 160(e). *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1174 (D.C. Cir. 1993).

deceit, and fraud. Pet. at 19-21. The ALJ found that Dan Baker's original interest in the union was to allow him to continue to participate in the union's health and welfare funds as he had as a union member. 27a. Dan Baker was told by business agent Wade Sheriff that he could not continue to participate in the union's special plans *once* he hired employees, at which point Dan Baker would have no *personal* interest in a union contract. 27a.

In the instant case, both contract principals (Baker and Sheriff) testified that the Letter of Assent was intended by them to apply to Dan Baker's sole proprietorship D.L. Baker, Electrical Contractor. Yet, the Board's ALJ finds that Dan Baker "misled" Sheriff into believing this. 28a. Hence, the named party to the Letter of Assent, *viz.*, D.L. Baker, Electrical Contractor, is not held to the bargain, but a third party, D.L. Baker, Inc., is. The result is not unlike the cases of *Central States Southeast & Southwest Areas Pension Fund v. Gerber Trucking Svc., Inc.*, 870 F.2d 148 (7th Cir. 1987), and *Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984), set forth in the Petition at 20-21, where the principals intend one purpose, but the courts direct another years later. The Board's opposition at 12 n.6 does not explain how a federal policy that tolerates voluntary prehire agreements is fostered by permitting them to be the object of coercion and "bait and switch policies."

Finally, the Board has not refuted that Petitioner's second Question Presented identifies a discrete conflict between the conclusion of the Fourth Circuit below that a prehire agreement automatically rolls over indefinitely and the District of Columbia Circuit in *Wilson & Sons Heating & Plumbing , Inc. v. NLRB*, 971 F.2d 758 (D.C. Cir. 1992), that held they do not. *See* Pet. at 15.

The question here for the Court is one of timing. The 5-4 conflict in the circuit courts will continue until such time as this Court grants certiorari to decide how an employer may exercise its "undoubted right to repudiate" a prehire agreement. However, for small employers in the construction industry with limited resources to contest the Board's position, denial of the writ will raise their

economic stakes in properly dealing with industry labor unions and also interfere with their being treated equally in all circuits.[5]

CONCLUSION

For these reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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Dated: December 11, 1997

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[5]The fact that the decision of the court of appeals below is unpublished should carry no weight in the Court's decision to review the case. *See Commissioner of Internal Revenue v. McCoy*, 484 U.S. 3, 4 (1987) (court of appeals exceeded jurisdiction regardless of non-publication or lack of precedential effect of a non-published ruling).